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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 288

T. H. REITER,

Petitioner,

vs.

ERNEST PALMER (impleaded with ILLINOIS NATIONAL CASUALTY COMPANY, an Illinois Corporation, CLAUDE H. BARR and ARTHUR M. FITZGERALD),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS TO REVIEW THE AFFIRMANCE OF THE DECREE OF THE SUPERIOR COURT, IN FAVOR OF ERNEST PALMER, AND BRIEF IN SUPPORT OF PETITION.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To Review the Affirmance of the Decree of the Superior Court in Favor of Ernest Palmer.

May It Please The Court:

The Petitioner, T. H. Reiter, respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of Illinois.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case involves the question as to whether or not an official appointed by the Governor as the head of a State Insurance Department, can disregard the mandatory direction of the Statutes of the State of Illinois, to do certain things in a situation involving the impairment of an Insurance Company organized and existing under the Laws of Illinois, and instead thereof said Superintendent with the approval of the Governor, make certain rules and regulations in the form of legislative actions dealing with the situation which authority was not provided for by the Statute, and taking the property of an individual without due process of law.

The Statutes of Illinois, in force at the time this controversy arose were Sections 105(2) to 105(14), Chapter 73, Ill. Rev. Statutes, 1935, pages 1838 to 1841 (Bar Assn. Ed.) entitled Insurance, provided that in case the head of the Insurance Department questioned the impairment of an insurance company under his jurisdiction, he was directed to refer it to the Attorney General, who, in turn was directed to present a petition to the Circuit Court of the County in which the insurance company was doing business, and ask for a rule to show why a Receiver should not be appointed therefor, upon a hearing to be held and determined by the Court. In other words providing for a judiciary proceeding whereby the defendant would have his day in court and due process of law in regard thereto. This was the only Statute in force in Illinois regarding any remedy that the head of the Insurance Department had in any situation wherein he questioned the impairment of an insurance company.

On May 11, 1933, the day after the impairment of this insurance company was first questioned, the following Statute was passed by the Legislature of the State of Illinois, approved by the Governor and entitled "Foreclosure of Mortgages on Farms and Homes by Insurance Companies." Mortgages Chap. 95 of the Revised Statutes of Illinois, 1935, Page 2142 (Bar Assn. Ed.). Set forth herein on pages 13-14-15.

The Constitution of the State of Illinois provided,

> "No Act hereinafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be expressed;" Const. of Ill. Article IV, Sec. 13, Ill. Bar Stats. 1935 P. 12.

The respondent, Palmer, who was then head of the Insurance Department of Illinois on the same day this Act was passed and approved by the Governor, adopted and promulgated with the approval of the Governor, the following rules and regulations:

> "The rules and regulations adopted and promulgated by the Superintendent of Insurance of the State of Illinois on the 13th day of May, 1933, in words and figures as follows:"
>
> "By the direction and with the approval of the Governor of the State of Illinois and pursuant to the authority vested in me by an act approved May 11, 1933, and in order to conserve the income and assets of the Illinois National Casualty Company for the benefit of its policyholders, creditors and the public generally.
>
> "I, Ernest Palmer, Superintendent of Insurance of the State of Illinois, hereby adopt and promulgate the following rules and regulations which I deem necessary for the purpose of carrying out the provisions of said law:

"(1) Pending final settlement of the affairs of this Company, Mr. C. H. Barr, Springfield, Illinois, is hereby appointed Conservator for a period of thirty days or until removed by me, with power to direct the affairs of said company in their entirety, provided, however, that no action shall be taken by him without first consulting me and then only with my approval.

"(2) All securities, investments, bonds, mortgages, etc., now included in the assets of the Illinois National Casualty Company shall be immediately deposited with the Superintendent of Insurance for safe keeping.

"(3) No securities, mortgages, moneys or anything of value, which may be included in the assets of the Illinois National Casualty Company at this date, shall be disposed of, nor shall there by any substitution of any securities, mortgages, or other assets of the company without my approval in writing.

"(4) No salaries or moneys shall be paid officers or employees of the company without my approval.

"(5) New business and renewals of old business may be written or rewritten, provided, however, any premiums received from policyholders on policies in force on or after the date of this order shall be set aside without deduction for the payment of commissions, brokerage, etc., in a special fund and invested only in Federal Government securities or bonds of the State of Illinois, so that they will be available for return to the policyholder paying the same in the event that the company is not able to work out of its difficulties and it is necessary to place it in liquidation.

"(6) Said C. H. Barr, Conservator, shall before issuing the powers and duties hereby authorized, furnish a bond in a company authorized to do business in Illinois and approved by the Superintendent of Insurance in the amount of Fifty Thousand Dollars ($50,000.00), (which bond ran to Palmer individually

and not to the People for use) for the faithful accounting of securities and moneys coming into his possession.

"(7) This order may be modified or terminated in whole or in part at any time upon my order.

"In Witness Whereof I have hereunto subscribed my name and affixed my official seal at the State Capitol at Springfield, Illinois, this thirteenth day of May, A. D. 1933.

Ernest Palmer (Signed)
Superintendent of Insurance and Acting
Director of Trade and Commerce.

"The above order is issued by the Superintendent of Insurance with my approval pursuant to the authority conferred by an act approved the eleventh day of May, A. D. 1933.

Henry Horner (Signed)
Governor of the State of Illinois.

"The above order extended thirty days.
Ernest Palmer (Signed)

Approved Henry Horner,
June 12, 1933, Governor.

"Above order extended thirty days until August 12, 1933.

Ernest Palmer (Signed)
Director of Insurance.

Henry Horner (Signed)
Governor."

Approved July 11, 1933.

"This order extended thirty days until September 12, 1933.

Ernest Palmer (Signed)
Director of Insurance.

Henry Horner (Signed)
Governor."

Abst. of Record, Ex. 25 P. 548.

The insurance company in question in this cause, of which petitioner, Reiter, was President, was in no way involved with the foreclosure of any mortgages on farms and homes, and no pretense was made by anyone that such was the fact. Nor was the impairment of the Insurance Company in any way involved in the foreclosure of any mortgage.

The Act of May 11, 1933, above set forth is shown under the title of Mortgages, and in no way provided for a remedy in case of the question of the impairment of an insurance company, but on the contrary thereof, Section 4, thereof, specifically states that nothing in said Act, shall affect the authority of the Superintendent of Insurance to deal with impaired insurance companies under the provisions of existing law which was Sec. 105 (2) to 105(14) Entitled, Insurance.

Palmer, respondent in this case, on May 13, 1933 allegedly by said rules and regulations appointed Barr (a disgruntled minority stockholder), as Conservator, and placed him in complete charge of said insurance company, thereby depriving petitioner Reiter of his rights as President of said company; further deprived him of his right to operate said company as a majority stockholder; further deprived him of his right to a salary as officer and director of said company; deprived him of his right to act as a Director of said Company; and later took from him his stock and personal property involved in said company. All without any or due process of law as provided for in Art. V of the amendments to the Constitution of the United States and Sec. 2 of Art. II and Sec. 19 of Art. II of the Constitution of Illinois, and the Statutes of the State of Illinois, and all under the pretense that the aforesaid Act of May 11,

1933, gave said head of the Insurance Department such authority.

The record discloses that by reason of the unlawful acts of said Palmer, and the deprivation of Reiter of his Constitutional rights both under the State and Federal Constitutions, that between May 12, 1933, and October 7, 1933, less than five months, the minority stockholder Barr, named Conservator, and the attorney Fitzgerald for Conservator, both appointed by Palmer, under his pretended power, by reason of said Statute of May 11, 1933, aforesaid, became the owners of the Reiter majority stock, and in complete control of said insurance company, without one cent of additional capital, and said Barr became the President, and his said attorney, Fitzgerald, became a Director, and said company was given the written approval to transact business as an insurance company by the respondent, Palmer, as head of the Insurance Department, who was the only one under the Statute of Illinois who could so approve such actions.

The respondent, Palmer, demanded the individual stock which was the majority stock of said Reiter in an Illinois Corporation, which holding company held the controlling stock of said Insurance company, and Palmer secured said stock on June 12, 1933, by written assignment of said Reiter made direct to said Palmer on his demands, and said Palmer afterwards by written assignments unlawfully transferred the stock of the insurance company controlled by said holding corporation.

The record is undisputed that this personal property of petitioner was assigned to Palmer in writing on the demands of his assistant, who stated it was "at the boss's request" (referring to Palmer) and after threats, "or else" to which there is no denial, and which is clearly shown by the record and found as a fact by the Appel-

late Court in its opinion, and by the Supreme Court in its original opinion of January 22, 1947.

Palmer approved the financial condition of this insurance company by his written approval on October 7, 1933, (Ex. 84, Abst. 560) and knew the condition of said company, the ownership of its stock and the unlawful deprivation of Reiter of any and all items in said insurance company although Palmer had, by reason of his rules and regulations, complete control of said Company from May 12, 1933, to October 7, 1933, and nothing, according to his rules and regulations could be done without his approval, and on October 7, 1933, Palmer approved the consolidation of said insurance company with an insurance company which he swears in his sworn answer, (Rec. 99, Abst. 94) "was of no worth"; nevertheless, he approved of its doing business in Illinois, knowing that not one cent of capital had been added since the pretended impairment, knowing that Barr, the disgruntled stockholder was President thereof, knowing that Fitzgerald, the attorney appointed by Palmer who had no interest in said companies whatsoever before May 12, 1933, was a Director thereof; knowing that said Barr and Fitzgerald had complete control of said company by reason of being the holders of the majority of stock; knowing that said Reiter had not received one cent for any of his interests in said companies, and Reiter was not the owner of any shares of said consolidated company, and this knowledge Palmer had on October 7th, 1933, and he knew on May 12, 1933, Reiter was president, majority stockholder, and in control of said company. In short and concise language Reiter had control of an active, going insurance company examined and approved by Palmer by written report dated February 3rd, 1933 (Ex. 3, Abst. 535) and on October 7th of the same year, Reiter was completely deprived of all his interest in said Com-

pany and the disgruntled stockholder, so-called Conservator, and his attorney, Fitzgerald, were in complete ownership and control thereof, and they were under Palmer's absolute control and direction from May 12 to October 7th, 1933 and from thence to date.

The Appellate Court opinion found that Palmer was a co-conspirator with Barr and Fitzgerald in procuring the stock interest and personal property of Reiter, in the above transaction of the control of said insurance company.

The first opinion of the Supreme Court of Illinois, dated January 22, 1947, hereto appended, sustained the theory of conspiracy, with the exception that it found Palmer was not one of the conspirators from which Reiter petitioned for a rehearing.

Reiter has contended in addition to said conspiracy, that said Palmer by reason of his unlawful acts in seizing said company and accepting the stock of Reiter, and making the distribution of the stock of Reiter, Palmer became a trustee, and as such trustee, *de son tort*, owed Reiter, a certain duty and while he was such Trustee *de son tort*, and in complete control of said Reiter's property and said company in addition Palmer's written voluntary act of assigning Reiter's rights unlawfully, he allowed Barr and Fitzgerald to unlawfully secure the control of Reiter's majority stockholding interest in said company, and that said Palmer was required to account to said Reiter therefor, but the Supreme Court of Illinois has denied Reiter such relief and has deprived him of any accounting whatsoever from Palmer.

There are many allegations and proof undenied by the defendants sustaining the findings of fact of the Appellate Court, that in addition to the unlawful acts of said

Palmer said Reiter was compelled to relinquish his interest in said Company through threats of criminal prosecution, coercion, duress, extortion and fraud, which Reiter contends could not have been made, carried out and perpetrated by reason of the fact that said so-called conservator and his attorney, were in complete control of said company under the rules and regulations that every act to be by them performed was to be by said Palmer's sanction, approval and knowledge.

Said Palmer during his unlawful control of said company moved a part of the furniture of the company to his own personal office, without any judicial proceedings. In August 1933, the State of Illinois issued a check in payment for the same.

Palmer in July, 1933, personally attempted to negotiate with reference to the sale of the control of said company. (Rec. 1064, Abst. 454-5).

Reiter contends that said Act of May 11, 1933, was unconstitutional, by reason of the Constitutional provisions hereinbefore set forth, if it granted Palmer the power Palmer purported it granted to him, that is to say to, appoint a conservator, and appoint an attorney for the conservator, and to take complete charge of an insurance company alleged to be impaired. The Supreme Court of Illinois has refused to pass upon said questions of Constitutionality.

Reiter contends that Palmer as his trustee *de son tort*, and as such trustee, must account even though he be not a conspirator, to Reiter for his trusteeship.

The Supreme Court of Illinois has refused to pass on said question and require Palmer to account to Reiter in any respect, although petitioner was completely deprived of his properties while in the control of Palmer.

Reiter, contends that under the Practice Act of Illinois, hereinafter set forth in substance, (prior to the 2nd day of July, 1947), that when the defendants in this case made their motion at the close of plaintiff's case for a dismissal of the same for want of equity, that was an act by all of said defendants, including Palmer, and constituted a submission of said cause upon its merits, and foreclosed Palmer and his co-defendants from producing any evidence, and that upon an appeal of said cause the court was compelled to enter a final order as provided for by the Appellate Court finding in accordance with the prayer of the complaint for such was the law on May 22nd, 1947, when the Supreme Court rendered its opinion.

The Act of the Legislature of Illinois, effective the 2nd day of July, 1947, herein set forth in substance, page 41-42 provided a different practice, and the decision of the Supreme Court of Illinois having been rendered on May 22, 1947, which decision purports to not be a final order as to the other defendants, is contrary to the Statute which was in force and effect at that time, the Supreme Court totally disregarding the fact that this act was not effective, by its decision made said Act of the 2nd day of July, 1947, an *ex post facto* law in violation of both State and Federal constitutions. If the law had been followed by the Supreme Court of Illinois as set forth by the Statute in force at that time the order in this cause as to all the defendants would have been a final order reviewable by this court.

THIS COURT HAS JURISDICTION.

(a) Statutory Provisions Sustaining Jurisdiction.

This appeal is within the jurisdiction of this Court under the terms of Section 237 of the Judicial Code (U. S. Code title 28, Sec. 344) which provides that a final judg-

ment or decree in any suit in the highest court of a State, "Where is drawn in question the validity of a statute of any State on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

The actions here are not only one of a State Legislature, but are actions of a Superintendent of Insurance, being head of one of the State Departments, wherein and whereby he adopted and promulgated certain rules and regulations with the Approval of the Governor which are and were not within the Act of the Legislature in question and further another action by a decision of the highest court of the State wherein its decision adds to the action of the State Legislature defining the practice in cases of equity not therein provided for. There can be no question with reference to the jurisdictional issue as to the action of the State Legislature.

The jurisdictional issue of the actions of the Superintendent of Insurance and of the actions of the highest court of the State are parallel with that in *Hamilton* v. *University of California*, 293 U. S. 245 (1934), in which an order of the regents of the University was the basis for an appeal to this Court. The Court saying at page 258:

> "The meaning of 'statute of any state' is not limited to acts of state legislatures. It is used to include every act legislative in character to which the state gives sanction, no distinction being made between acts of the state legislature and other exertions of the state law making body."

The standard here created and supported by the Supreme Court of Illinois is legislative in character and the sustaining of such a standard by the Supreme Court of

Illinois makes it applicable to all insurance companies of the State. However, the fact that the present case applies to only one company does not defeat its statutory character. *King Manufacturing Company* v. *Augusta*, 277 U. S. 100 (1928). The findings and judgments are in violation of Reiter's constitutional rights under the Fifth and Fourteenth Amendments to the U. S. Constitution.

(b) State Statute, the Validity of Which Is Involved.

As indicated above, this case does not only involve the validity of an act of the State Legislature but the action of a Superintendent of Insurance, being one of the State Departments wherein and whereby he adopted and promulgated the certain rules and regulations on May 13, 1933, with the approval of the Governor of the State of Illinois, which are set forth in full heretofore on Pages 3-4-5.

The decision of the highest State Court has been in favor of the validity of the rules and regulations of said Superintendent of Insurance approved by the Governor which constitutes exertions of the State Law making power.

The validity of the Mortgage Act of the Legislature and the actions of the Superintendent of Insurance arise under the following Act of the Legislature entitled "Mortgages, Chap. 95, P. 2144 Rev. Stat. of Ill. 1935, which reads as follows:

> "Foreclosure of mortgages on farms and homes by insurance companies.
>
> An Act relating to insurance companies and the foreclosures of mortgages held by insurance companies on farms and homes, and providing that subject to the approval and by direction of the Governor of the State of Illinois the Superintendent of Insurance may adopt and promulgate rules and regulations affecting the control of insurance companies and declaring an emergency. Approved May 11, 1933, in effect May 11, 1933. Laws of 1933 page 649.

Be it enacted by the people of the State of Illinois represented in the General Assembly; (Par. 30. Police power of State invoked.) Section I. It is hereby declared that an emergency exists in the State of Illinois and in the nation with regard to the financial condition of its people generally and with respect to financial and investment institutions, including the business of insurance and the provisions of this Act are therefore necessary for the protection of the public as a whole, to preserve the stability of insurance companies, to prevent undue preference among the policyholders of said company, and to conserve the income and assets of such company for the benefit of their policyholders, beneficiaries and creditors. It is further hereby declared that the general welfare and safety of the People of the State of Illinois and the Nation are involved and that it is necessary to invoke the police power of the State in the public interests. Jones Ill. Stat. Ann. 83.25.

(Par. 31. Rules and Regulations to carry out Act —Powers of Superintendent of Insurance to adopt —suspension of conflicting laws.) Section II. Subject to the approval and by the direction of the Governor of the State of Illinois, the Superintendent of Insurance is hereby authorized to adopt, promulgate, modify, enforce or rescind from time to time such rules and regulations as may be deemed necessary for the purpose of carrying out the provisions of this Act by maintaining safe and sound methods for the transactions of the business of insurance, for the purpose of safe-guarding the interests of policyholders, beneficiaries, creditors and the public generally. Upon the adoption and promulgation of any such rule or regulation any law or part of any law which may be in conflict with any such rule or regulation is hereby suspended and shall continue to be suspended so long as such rule or regulation continues in force and effect, but upon the repeal or revocation of such rule or regulation and upon expiration of this Act by limitation, all of such laws or parts of laws which

have been suspended shall again be in full force and effect. Jones Ill. Stat. Ann. 83.26.

(Par. 32. Stay of Foreclosure and Incidental Proceedings—Extension of Time for Payment—Powers of Governor or Superintendent of Insurance.) Section III. The Governor is hereby authorized in his discretion or the Superintendent of Insurance with the approval of the Governor, to stay any foreclosure or proceeding incident to such foreclosure and to provide extension of time for the payment of mortgage indebtedness, either principal or interest, on any morgtage on a farm or homestead where such mortgage is owned or held by an insurance company which is subject to the provisions of this Act. Jones Ill. Stat. Ann. 83.27.

(Par. 33. Powers of Superintendent of Insurance as to impaired companies not affected.) Section IV. Nothing in this act shall affect the authority of the Superintendent of Insurance to deal with impaired insurance companies under the provisions of existing law. Jones Ill. Stat. Ann. 83.28.

(Par. 34. Violation of Rules by Insurance Companies—Revocation of Authority to do Business.) Section V. Any insurance company violating any rule or regulation promulgated in conformity with this Act shall forthwith be subject to having its authority, and that of its agents, to transact business in this State revoked. Jones Ill. Stat. Ann. 83.29.

(Par. 35. Expiration of Act.) Section VI. This Act shall expire by limitation at midnight on June 30th, 1935. Jones Ill. Stat. Ann. 83.30.

(Par. 36. Emergency.) Section VII. For the reason stated herein it is necessary that the police power of the State be invoked and therefore an emergency exists and this Act shall take effect upon its passage. Jones Ill. Stat. Ann. 83.31.

The Mandatory act of the Legislature defining the duties of the Superintendent of Insurance provided specifically his duties and the manner of carrying the same into

effect, and are those referred to in Section 4, Paragraph 33 of the preceding Mortgage Act. The validity of this Act is not involved but we quote it to clarify the above Mortgage Act, Par. 33, Sec. 4.

This Statute provides as follows (Chapter 73, Par. 105 (2): Entitled Insurance:

"'Proceedings by Attorney General). Section II. Whenever any resident company (2) is insolvent; * * * (c) whenever its capital or its reserve shall have become impaired; * * * (e) is found after an examination, to be in such condition that its further transaction of business will be hazardous to its policy holders, or to its creditors, or to the public; * * * (k) on consent of a majority of the directors, stockholders or members of such resident company, then the director shall report any such case to the Attorney General of this State whose duty it shall be to apply forthwith by petition of the director in the name of the People of the State of Illinois to the Circuit Court of the County in which the principal office of such company in this State is located for an order directing such company, upon such notice as the Circuit Court may prescribe, to show cause why a receiver should not be appointed as hereinafter set forth to take possession of its property and conduct its business, and for such other relief as the nature of the case and the interest of its policyholders, creditors, members, stockholders or the public may require. Jones Ill. Stat. Ann. 66.068.'

"(Par. 105 (3). Injunction—Hearing—Determination—Receiver—Bond—Duties). Section III. On such application as provided in Section Two, or at any time thereafter, such court, may, in its discretion issue an injunction order restraining such company and its officers, agents and employees, from the transaction of its business or the disposition of its property until the further order of the Court. * * * On the return of such order to show cause, and after a full hearing the Court shall enter an order either

denying the application or finding that a sufficient cause exists for the appointment of a receiver to take possession of and conduct the business of such company until the further order of the Court having jurisdiction in the premises. * * * Upon the appointment and qualification of such receiver as aforesaid, he shall forthwith take possession of the property and conduct the business of such company, and retain such possession and conduct such business until, on the application either of the director, to the Attorney General, or of such company, it shall, after a like hearing, appear to the Court that the ground for such order for the appointment of such receiver has been removed and that the company can properly resume possession of its property and the conduct of its business."

This section above cited of The Insurance Act, Chapter 73, paragraph 105 (2), is the authority of the Superintendent of Insurance to deal with impaired insurance companies under the provisions of the existing law as more fully appears from the record in this Court, no court action of any character was taken by the Superintendent of Insurance in this matter in accordance with said Act but notwithstanding the fact that under said Mortgage Act there is no provision for the appointment of a conservator, nevertheless the Rules and Regulations above set forth show that the said Superintendent of Insurance did without any other authority, proceed to appoint a disgruntled minority stockholder as so-called "conservator", when under the Statutes of Illinois the proper proceeding would have been in accordance with Sections above cited of Chapter 73, which provided for a judicial proceeding conducted by the Attorney General of the State in the Circuit Court of the County where the Company's office was maintained and under that Act there was no provision for a conservator but only after a full

hearing before the court, either a discharge of the rule to show cause, or an order directing the appointment of a receiver as in said Act set forth which would constitute due process of law.

The Statutes of Illinois have only one provision for the appointment of a "conservator", and that falls within Chaper 85, entitled Lunatics, etc., page 3034 Bar Revised Statutes, 1935, and even under that Act, it provides that, no person shall be deprived of his property unless adjudged insane, and the appointment of a conservator, must be upon a petition filed for that purpose in the County or Probate Courts of Illinois and a jury of six persons shall be empaneled to try the case.

The present case deals with the illegal action by the Superintendent of Insurance in a manner for which there is no provision under the laws of Illinois, and the action of the Superintendent of Insurance in taking from appellant Reiter, his personal property, stocks, depriving him of his position and salary as president of the insurance company, the transfer of his office furniture to the office of the Superintendent of Insurance, and the depriving him of his interests in the affiliated corporations which were not under the jurisdiction of the Insurance Department of Illinois, were in violation of Reiter's constitutional rights under both State and Federal Constitutions, and he was deprived of his property without due process of law and without any compensation therefor.

The decision of the highest State Court has been in favor of the validity of the actions of Palmer Superintendent of Insurance as set forth above.

The Legislature of Illinois did, by an Act approved July 21, 1941, amend Section 64, Chapter 110, Practice

Act of Illinois by adding Paragraph 4, which reads as follows:

> "Upon the trial of a proceeding in equity defendant may, at the close of plaintiff's case, move for a finding in his favor or move to dismiss the suit for want of equity. Either motion shall constitute a submission of the cause for decision on the merits. If the decision on the motion is adverse to the defendant he may proceed to adduce evidence in support of his defense, in which event the motion to dismiss or for a finding shall be deemed to have been waived and withdrawn. As amended by act approved July 21, 1941. L. 1941, vol. 2, p. 464. S. H. A. 110 Sec. 188; J. A. 104.054."

Section 188, Chapter 110, Page 2532 Illinois Bar Statutes 1945.

At the close of plaintiff's case each of the defendants under the aforesaid amendment did move for findings in their favor and moved to dismiss the suit for want of equity.

Under the amendment such a motion or motions constituted a submission of the cause for a decision on the merits, said motions were granted the defendants, and said orders entered were in favor of and not adverse to the defendants, which if they had been adverse, they could have presented such defense as they saw fit. A decree was entered by the Chancellor affirming said orders and dismissing the complaint for want of equity, in accordance with said defendants' motions, from which an appeal was taken to the Appellate Court of Illinois, which reversed said decree and ordered the cause remanded, and a decree entered for accounting against the defendants in accordance with the prayer of the complaint.

The opinion of the Appellate Court appears in 328 Ill. App. 234, 65 N. E. 2nd 830. From that decision defendants appealed to the Supreme Court of Illinois, which rendered its opinion on January 22, 1947, a copy of which is hereto appended. Thereafter plaintiff filed a petition for rehearing on its finding as to Palmer, and Barr and Fitzgerald also filed petitions, and the same being granted, the Supreme Court thereafter filed an opinion on May 22, 1947, reversing the decision of the Appellate Court and reversing its own opinion of January 22, 1947 but failing to pass on the constitutional questions raised on said appeals. This opinion appears in Advance Sheets 73 N. E. Reporter 2nd Series 412; 397 Illinois 141 of July 2nd, 1947.

The Statute in question provides that the making of the motions and the submission of the cause on its merits, is not waived and withdrawn, except in the event that the motion is adverse to the defendants. It was not adverse to them in this cause, and therefore the highest court of this State in its last opinion of May 22, 1947, has made exertions of the State law making body.

The actions of the Supreme Court of Illinois, with the Legislature having established the law as set forth by Section 4, aforesaid, is assuming the prerogatives of the State law making body, and it presuming to add thereto an amendment (which amendment the legislature did pass as set forth in following paragraph) permitting the defendants who had submitted their cause of action on its merits, to now offer evidence in defense and thereby reopen said case, and submit a defense which everyone of them failed to offer before they submitted said cause on its merits, and adding thereto the clause that if the decision on the motion is not adverse to the defendants

the motion to dismiss or for a finding shall be deemed to have been waived and withdrawn, is going far beyond the authority and jurisdiction of said Court, and violates its own affirmance of *People, ex rel.* v. *Collins*, 351 Ill. 551, 184 N. E. 641 holding:

> "We have no power by judicial interpretation to extend the operation of a Statute beyond the limits specified therein. This can be accomplished only by Legislative action."

The legislature again amended said Section 64, during its last session, which amendment did not become effective until July 2, 1947 (after the decision in this case) this amendment will appear in the 1947 Illinois Sessions Laws not yet unblished, but in substance extended the practice to allow the defense to proceed and waiver of the submission on its merits in either case of where the ruling was adverse or favorable and in case of reversal by appeal to allow the defense to produce its evidence.

The decision of the highest State Court has been in favor of making said last amendment an *ex post facto* law contrary to both state and federal constitutions. That the court can not indirectly do what it can not do directly is elementary.

THE QUESTIONS PRESENTED.

I.

Reiter was deprived of his property without due process of law, in violation of both State and Federal Constitutional rights, by reason of the failure of Palmer to comply with the law by reporting to the Attorney General, and causing a suit to be filed in accordance with the Legislative Mandate.

II.

Reiter was deprived of his property rights without due process of law, and contrary to his Constitutional rights under both State and Federal Constitutions, because the Act of May 11, 1933, of the Illinois Legislature, entitled, "Foreclosure of Mortgages on farms and homes by insurance companies", did not provide for the appointment of a Conservator, and said act was in violation of the Constitutional provision "No Act hereunder passed shall embrace more than one subject."

III.

That under the laws of Illinois there was no provision for the appointment of a Conservator, except in the matter of Lunatics, Idiots, etc., and such provision required the submission to and finding of a court. Chapter 85, Page 3034 Bar Rev. Statutes 1935.

IV.

There was no law providing for the appointment of a Conservator in the State of Illinois, and the rules and regulations made by the Superintendent of Insurance,

with the approval of the Governor, providing for the appointment of a Conservator, were not based upon any Statute of the State of Illinois, and constituted a Legislative Act, by a Public Official, and denied Reiter his due process of law by not providing for a judicial hearing thereon.

V.

Reiter was deprived of his Constitutional rights because the Practice Act of Illinois provided that at the close of Reiter's case motions by the respondents to dismiss the complaint or for a finding in their favor, constituted a submission of the cause on its merits, and having made such motion and the same being granted, the respondents had had their day in court, and under the said Statute, as well as the prevailing decisions of Illinois, were barred from offering any other or further defense.

VI.

That notwithstanding the said provision of the Act submitting the cause on its merits, the Supreme Court of Illinois, attempted to and did refuse to follow the said Act, but attempted by its decision to legislate and pass a different ruling than that provided by the Legislature.

VII.

The Act of the Supreme Court of Illinois in applying to this case the amendment of the Legislature approved the 2nd day of July, 1947, violated the Constitutional Rights of Reiter, by making the same an *ex post facto* law, in violation of both the Federal and State Constitutions.

VIII.

Reiter was deprived of his rights under both State and Federal Constitutions, by the failure of the Supreme Court to find that Palmer had by threats of prosecution, extortion and fraud, forced Reiter to assign to him 14,805 shares, being the controlling stock of the insurance company for a pretended rehabilitation of the company.

IX.

That Reiter was deprived of his property and his Constitutional rights, by the failure of the Supreme Court of Illinois to compel Palmer to account for taking Reiter's property without compensation on pretense of rehabilitation or otherwise, and failing to return said properties to Reiter.

X.

That the Supreme Court failed, neglected and refused to follow the findings of fact of the Appellate Court, which found the respondents guilty of a conspiracy in the securing of Reiter's stock, and ordered an accounting therefor from said respondents including Palmer.

XI.

Reiter was deprived of his Constitutional rights by reason of the failure of the Supreme Court of Illinois to pass upon the Constitutionality of the Act of May 11, 1933, under which Palmer appointed Barr a conservator.

XII.

The record shows and sustains the finding of facts made by the Appellate Court of Illinois in its opinion. The

Statute of the State of Illinois provides that the Supreme Court shall only have the right to inquire as to whether those facts are sustained by the evidence, and as there was no defense offered by any respondent and the cause submitted on its merits, the Supreme Court of Illinois had no right to vacate said finding of facts. Par. 36 Sec. 92. Chap. 110-1945 Bar Rev. Stats. of Illinois.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Substantial Federal questions are present in this cause as to whether a Citizen of the United States can be deprived of all of his property rights which were substantial, and so found by Palmer by a written report after an examination signed by him, dated February 23rd, 1933, wherein he found Reiter to be the President, and receiving a salary of $1000.00 per month, the owner of the majority of the stock of an insurance company with a capital of $200,000.00 and approximately $30,000.00 surplus as of November 30, 1932, and without any Judicial proceedings of any kind or character, and through the actions of Palmer as head of the Insurance Department of the State of Illinois, between May 12, 1933, and October 7, 1933, Reiter was deprived of all of his property and rights in said company which were the same as of November 30, 1932 in a manner in which this record shows without any consideration to him, and without Palmer being required to account to him as to what became of his property, although the record shows it was transferred to Palmer under duress, threats of prosecution and extortion, by written assignments and reassigned by Palmer to others without the advice, consent or knowledge of Reiter.

We respectfully submit that this court has never had a more flagrant violation of Constitutional rights of a

citizen presented to it before. Said Insurance Company continued to function as such while in Palmer's control under his own made rules and regulations, and the stock interests of Reiter therein were pretended to be taken from him and pretended to be owned and held by Palmer's so-called Conservator and Palmer's appointed so-called attorney for Conservator, and said Insurance Company was not released by Palmer from his rules and regulations until October 7, 1933, after he, by his written approval of consolidation knew these facts had been accomplished, and said so-called conservator, and his so-called attorney for Conservator, appointed by Palmer under his own rules and regulations have enjoyed the position of ownership, control and management with all its attendant benefits during these thirteen years of litgation, and are still enjoying them, and said company is now a State reported Two Million Dollar insurance company.

There can be no doubt but that the Supreme Court decision is a final order as to Palmer, clearly reviewable by this court as such on certiorari.

We urge that this court should of its own volition, and in consideration of the facts presented, review the orders of the Illinois Supreme Court as to the other defendants, in view of the fact that such orders were in violation of the laws of Illinois, and if the laws of Illinois had been followed by the Supreme Court, the rights of those defendants would have been fully decreed and legally adjudicated.

This suit involves the unlawful conduct of State officials and through whom Reiter has without a doubt suffered the loss of his property and business without any judicial proceedings except this brought by him to recover. The action of these public officials and defendants is shown

by the record and Reiter has been compelled to resort to the Appellate Court three times and the three opinions are *Baker Walsh* v. *Ill. Nat. Cas. Co.*, 283 Ill. App. 638; *Reiter* v. *Ill. Nat. Cas. Co.*, 291 Ill. App. 295; *Reiter* v. *Ill. Nat. Cas. Co.*, 328 Ill. App. 324. He has had two opinions from the Illinois Supreme Court one on the direct appeal, and one on petition for rehearing which we are presenting to this court. Said public officials and defendants have never testified, notwithstanding the serious charges made against them. Surely Reiter is entitled to a review of this proceeding by this Court, which is removed from State officialdom of Illinois, and from the site of the wrongdoing, and the home office of the spoils still being enjoyed by the defendants, and more especially in view of the fact that the Supreme Court of Illinois has failed to pass upon the Constitutionality of the very laws that are the alleged basis for the taking of his property without judicial process.

Respectfully submitted,

JOHN A. BROWN,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No.

T. H. REITER,

Petitioner,

vs.

ERNEST PALMER (impleaded with ILLINOIS NATIONAL CASUALTY COMPANY, an Illinois Corporation, CLAUDE H. BARR and ARTHUR M. FITZGERALD),

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions Below.

The opinion of the Appellate Court for the first District is reported in 328 Ill. App. 234; 65 N. E. 2nd 830. The first opinion of the Supreme Court of Illinois is appended hereto.

The second opinion of the Supreme Court of Illinois is reported in Advance Sheets 73 N. E. Reporter, 2nd Series 412; 397 Ill. 141, of July 2, 1947.

Jurisdiction.

The decision of the Supreme Court of Illinois approving the validity of the appointment of a Conservator without any Statutory provisions therefor, nor are there any Statutory provisions with reference to his methods of appointment, his duties, his responsibilities or a bond for faithful performance.

Also approving the validity of the taking without consideration by Palmer of the property of Reiter and his transfer thereof, without due process of law and any duty to account to Reiter therefor when requested by this judicial proceeding.

Also approving the right of the head of an Executive Department of the State of Illinois, to promulgate rules and regulations which were and are solely exertions of a law making body and the duty of the Legislature.

Also approving the actions of the Supreme Court of Illinois in attempting to place an amendment to the Statute in vogue and effect in its decision in this case on May 22nd, 1947 when the act did not go into effect until July 2nd, 1947, forty days thereafter, thereby considering it as an *ex post facto* law.

Statement of the Case.

The decision of the Appellate Court set forth at length a statement of the case as does the first opinion of the Supreme Court appended hereto, and we submit these statements together with our Summary Statement of the matter involved herein set forth, does fully advise this Court of Reiter's statement of the case which we adopt without further reiteration thereof.

Errors Relied Upon.

Reiter assigns as errors the following:

I.

The holding of the Supreme Court of Illinois that a State Department head may make rules and regulations without any provision in law therefor, which rules and regulations provide for the appointment of a conservator by him to take charge of private property, without any judicial proceedings.

II.

The failure of the Supreme Court to pass upon the Constitutionality of the Act of May 11, 1933, which violated Art. IV, Section 13 of the Constitution of Illinois.

III.

Failure of the Supreme Court to pass upon the Constitutionality of the Act of May 11, 1933 and its sufficiency to justify the acts of Palmer to appoint a Conservator to take charge of property without judicial proceedings.

IV.

The failure of the Supreme Court to hold that the Insurance Superintendent had no jurisdiction to proceed otherwise than that provided by Chapter 73, Entitled Insurance, and the sub-paragraphs thereof, in the matter of an impaired insurance Company.

V.

The failure of the Supreme Court to follow the amendment of 1941 to Section 64 Paragraph 4 of the Practice Act.

VI.

The actions of the Supreme Court in attempting to amend Section 64, Paragraph 4 of the Practice Act, by disregarding the provisions of the said Act, and attempting to amend the same, when and considering an amendment which was pending before the Legislature, and passed June 23rd, and was not in effect until July 1, 1947, long after the decision in this cause.

VII.

The actions of the Supreme Court in entering a judgment in this cause in accordance with the amendment of 1947 to Section 64, Paragraph 4 of the Practice Act which became effective on July 1st, 1947, thereby establishing said amendment as an *ex post facto* law.

VIII.

The failure of the Supreme Court to compel Palmer to account to Reiter for property personally received by Palmer without consideration under circumstances creating him a trustee.

IX.

The failure of the Supreme Court to pass upon the question of the taking of Reiter's property in violation of his Constitutional rights both State and Federal without due process of law.

X.

The failure of the Supreme Court to affirm the findings of the Appellate Court as to the conspiracy between Palmer, Barr and Fitzgerald to seize and possess the property of Reiter without due process of law.

XI.

The failure of the Supreme Court to pass upon the questions of fraud, duress, coercion, extortion and intimidation practiced upon Reiter to compel him to transfer his property to Palmer, without due process of law and without judicial proceedings, and in violation of said State and Federal Constitutional rights of said Reiter.

ARGUMENT.

May It Please The Court:

We will attempt to make our argument logical by following our errors relied upon, and giving it the same numbers as we have said errors.

I.

The case of *Hamilton* v. *University of California*, 293 U. S. 245 (1943) involves an order of the Regents of the University and in that case, page 258 this court has stated:

> "The meaning of the 'Statute of any State' is not limited to acts of State Legislature. It is used to include every act Legislative in character to which the State gives sanction, no distinction being made between acts of State Legislature and other exertions of the State Law making body".

Clearly, the rules and regulations of the Superintendent of Insurance of the State of Illinois, comes within the same category as the above statement. The rules and regulations of the Insurance Superintendent in this case without a question of doubt were Legislative in character and though they are applied to this one insurance company to sanction the validity thereof, thereby to create a condition whereby they would apply to any insurance company. Therefore they assume a Legislative character.

The Statutes of Illinois only provided for the appointment of a Conservator to take charge of property in the Lunatic Act, Chapter 85, Ill. Bar. Stats. 1935, heretofore referred to and this Act provides that a person shall

not be deprived of his property through a Conservator until and unless a petition has been filed in the County or Probate Court duly verified, and a hearing is had thereon, and there must be at least a jury of six persons to try the subject matter of the right to adjudge him insane, and to appoint a Conservator to take charge of his property, it further provides the Conservator's duties, his qualifications, his giving of a bond, and for an accounting to the court for his acts, correctly reported to the Judicial Branch of the Government as provided for by the Constitution of Illinois, and the Constitution of the United States. There was no question of insanity involved in this proceeding nor was there any attempt to comply with this portion of the Statute. So it is unnecessary for us to even submit authorities on that point to this Court.

II and III.

Practically simultaneously with the promulgation of the rules and regulations by Palmer involved herein, the Legislature of Illinois, did pass an act which we refer to as the Mortgage Act of May 11, 1933, as that Act appears under Mortgages in the 1935, Statutes of Illinois. That act is entitled, "Foreclosure of Mortgages on Farms and Homes by insurance companies". That Act does provide for certain rules and regulations to be made by the Superintendent of Insurance, and it is attempted to justify the rules and regulations in this case by the provisions of said Act. There is no doubt, nor is there any contention that no foreclosures of any mortgage was involved with reference to this insurance company. The only question involved was the question of impairment raised by the Superintendent of Insurance himself. Section 4, of said Mortgage Act, expressly states that noth-

ing in said Act shall affect the authority of the Superintendent of Insurance to deal with impaired insurance companies under the provisions of existing laws [Chap. 73, Insurance] clearly showing that the Legislature had no intention of applying it to impaired insurance companies. Reiter has contended at all times that if this Act provided the proper authority for Palmer to do what he did in this case it was clearly Unconstitutional under Section 13 Article IV, of the Constitution of Illinois which states:

> "No Act hereafter passed shall embrace more than one subject, and that shall be expressed in the title, but if any subject shall be embraced in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be expressed."

The Supreme Court of Illinois has repeatedly voided Legislative Acts by reason of their failure to comply with said Constitutional provision, and we refer you to *People* v. *Mahumed,* 381 Ill. 81, and cases therein cited. The fact that the title to the Mortgage Act states nothing with reference to impaired insurance company is obvious and it is further obvious that it states nothing with reference to the appointment of a Conservator or with the right of the Superintendent of Insurance to take property. The Supreme Court of Illinois has failed to pass upon these questions and it surely was vital to the issues in this cause, as it was the only Act of the Legislature relied upon by Palmer to attempt to justify his rules and regulations, but instead of passing upon its Constitionality, the Supreme Court in its first opinion says:

> "We need not stop to consider the validity of this Act of the General Assembly or the powers granted thereunder. Assuming the Act of Palmer in appointing a Conservator was not authorized by law, the

> record shows that he acted with the approval of the Governor, and purported to act under the authority of this Statute. He believed that he had such power. Obviously the Governor entertained the same view."

This is not a correct statement of the law, nor is it a construction of the Statute or its Constitutionality, which Reiter was entitled to have passed upon by that court. If this was allowed to stand as the law we might as well abolish the Legislative Branch of the Government, and let the executives pass the laws on the theory that they believe they have the authority, and believe it their duty according to the belief of the individual occupying an executive position independent of any ulterior reason that he might have therefor.

It was the duty of the Supreme Court of Illinois to pass upon this question, especially in view of the fact that it is the only Statute Palmer relied upon for granting him the powers and exercising the authority he exercised in this case. The failure of the Supreme Court to pass upon the Constitutionality of this Act, and allowing Palmer to act thereon, and take Reiter's property without any process of law by reason thereof, surely gives this Court jurisdiction under the Constitution of the United States, for Reiter's property was taken away from him without due process of law, because if it was unconstitutional, there was no basis in law for any of Palmer's acts. Especially is it true that a duty was imposed upon the Supreme Court to pass upon this matter in detail, by reason of the decision of the Appellate Court, which specifically set forth in its decision in construing the Act of May 11, 1933:

> "No Statute gave him the power he exercised in appointing Barr Conservator of the Casualty Company and conducting its business through him. He was also without authority as Superintendent of Insurance to take or receive Reiter's stock in the Cas-

ualty Company and the holding company, and to surrender and reassign it for redistribution pursuant to the transaction of June 28, 1933."

Surely Reiter had a right to have the Supreme Court pass upon a Statute which the Appellate Court has so passed upon, and the Supreme Court's failure to do so is a complete disregard of the Constitutions of the State and the United States which provide for due process of law.

IV.

The Supreme Court failed in its opinion to even comment upon the duty of Palmer to proceed under Chapter 73, entitled "Insurance", in the matters involved in this case. This Act was mandatory, clear, plain and without question as to Palmer's duty where an Insurance Company was involved which was questionably impaired, and that was all that was involved in this situation. We do not admit the impairment, but Reiter was entitled to his day in court as to whether or not there was an impairment, and this Statute gave him his remedy in court, it provided that Palmer referring it to the Attorney General of Illinois, and that official was in turn required under the same mandatory Statute to file a petition and provide Reiter his day in court. In other words it provided for an orderly due process of law in accordance with the Constitutions of Illinois and of the United States, but Palmer failed to in any manner recognize or follow such law, even though Section 4 of the Act which he pretended to act under of May 11, 1933, stated that that Act should not interfere with Palmer's dealing with impaired insurance companies as provided for in Chapter 73.

Surely Reiter was entitled to have the Supreme Court pass upon this question, more especially where the Appellate Court's decision pointed out that Chapter 73 was the only authority for Palmer to take any action on an impairment of any insurance company, and that was the error urged in the appeal to the Appellate Court, and the Supreme Court has failed to comment thereon.

> "A disregard of the command of the Statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the Statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Com. Dig. tit. Action upon Statute (F), in these words: So, in every case, where a Statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same Statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." (Per Holt, C. J., Anon., 6 Mod. 26, 27).

The action of Palmer in this matter was contrary to Reiter's Constitutional rights under both Federal and State Acts, but the Supreme Court of Illinois was just as far from protecting him in those rights as were the actions of Palmer. The Insurance Act [Chap. 73] further provided for the appointment of a Receiver—not a Conservator— only after an orderly hearing in a judicial proceeding if the court found that the Company was impaired and it sets forth the further proceedings to be taken by the court thereafter.

It must raise a question in one's mind, taking into consideration the results obtained in this case. Why Palmer proceeded in the method in which he did, rather than his following the orderly mandatory process provided for by the Statute. The method used, the results

obtained and the record in this case as to his conduct after results were obtained, is not consistent with plain common honesty and with fair dealing. We constrain ourselves from further comment on how the Supreme Court could justify its total failure to recognize and pass upon the Constitutionality of the Act that Reiter presented to it—and its failure to even comment on Palmer's disregard of his mandatory duty which the Appellate Court so clearly defined, especially in view of the results which arose in this case when in less than five months the conservator and his attorney were in complete ownership and control of Reiter's stock, were officers and directors of the company and in complete enjoyment to this date.

We cannot comprehend why a Conservator was pretendedly appointed, rather than a Receiver as the statute provided, unless Palmer anticipated the results which could only be obtained in this case as part of the conspiracy that was charged in the complaint, and was thereby avoiding the elementary law that no court would allow a Receiver and the Receiver's attorney to become the complete owners of the property which they took over as Receiver and attorney for Receiver, in less than five months without any consideration to Reiter who was prior thereto, in complete control and the owner of the majority of its stock.

V, VI and VII.

We also have a most confusing condition arising in this case with reference to the Practice Act and the court's failure to recognize the Legislative directions with reference thereto. We cannot elaborate very much on what the Supreme Court has said in the first opinion in this case with reference to the proper practice under the Statute of the State of Illinois, although they had affirmed

the same practice before in the case of *Kanauske* v. *Clark*, 388 Ill. 357, and the Appellate court in this case relied upon that decision, stated that case. Illinois adopted the common law and the chancery practice and there is no better statement of the chancery practice than the case referred to in the first opinion of the Supreme Court, entitled "*Street* v. *Chicago Wharfing & Storage Co.*, 157 Ill. 605" which declared the practice in chancery from the time of Illinois statehood, and when the Practice Act revising all of Illinois proceedings was adopted in 1934. This particular practice in chancery cases remained undisturbed. In 1941 the Legislature amended the Act by adding to Section 64 Paragraph 4, a provision in which there can be no doubt as to the legislature's intention, and we say this regardless of what the Supreme Court said in its last opinion in this case because it agreed with us unanimously and with the appellate courts, and its own former opinion in the *Kanauske* case, *supra*, stating that:

> "Upon a trial of a proceeding in equity defendant may, at the close of plaintiff's case, move for a finding in his favor or move to dismiss the suit for want of equity". (This is exactly what the defendants and each of them did in this case). "Either motion shall constitute a submission of the cause for its decision on the merits. If the decision on the motion is adverse to the defendant he may proceed to adduce evidence in support of his defense" (the decision on the motion of the defendants in this case was not adverse to them). "In which event the motion to dismiss or for a finding shall be deemed to have been waived and withdrawn".

That is the complete amendment, so that the law was only changed in the particular respect mentioned in this amendment, and as we have heretofore stated, this does not need any construction. It is very plain, and there

cannot be read into this Act any different construction or intention, because the language is too plain. The first decision of the Supreme Court herein ably discussed and approved it and devoted some nine pages to sustaining it, and that opinion is appended hereto, we invite its consideration by this Court.

There was introduced in the Legislature of Illinois, Senate Bills 66 and 67, on February 18, 1947, while this case was pending in the Supreme Court and practically a month after said first decision, which Bills changed the law just above set forth, whereby it stated that a defendant may proceed to move to dismiss, or for a finding, and either motion shall constitute a submission of the cause on its merits, but further provided that:

> "If the decision on either motion is favorable to the defendant, a decree dismissing the complaint shall be entered, and the making of the motion shall not be deemed a submission of the cause by reason of the refusal of the trial court to deny the motion, if the trial court errs in allowing the motion, and enters a decree dismissing the complaint."

Then it provides the same as the former Act that if the motion is adverse to the defendant he may proceed to adduce evidence. Then it adds:

> "If the decision on such motion is favorable to the defendant and upon appeal to any reviewing court such court decides that the trial court committed error and reverses the trial court, then such reviewing court shall remand such cause to the trial court with directions to deny the motion originally made by the defendant, set aside the decree dismissing the complaint and proceed as though such motion had been denied by the trial court or waived and withdrawn by the defendant prior to the decree in the trial court, and any mandate heretofore issued by a reviewing court shall be considered as so providing,

> if the cause is still pending in the trial court, notwithstanding any provision or direction in the mandate directing the trial court to enter a decree for the plaintiff."

An amendment was also added to Section 92, of the Practice making said section to conform to said amendment.

These Bills were passed by the Legislature on June 23, 1947, and became effective on July 1, 1947, after the final decision was entered in this case by the Supreme Court, on May 22.

It can readily be seen by the reading of the first decision of the Supreme Court rendered on January 22nd, 1947, that the court was thoroughly convinced that the Amendment of 1941 to the Practice Act had been rightfully construed by the Appellate Court and by the Supreme Court's former decisions and was not subject to further construction, except to hold that the defendants in this case had submitted their cause on its merits, and that the finding of the reviewing court in case of a reversal was as set forth by the Appellate Court correct, in providing that a decree should be entered in accordance with the prayer of Reiter's Complaint, and was a final order on review by the Supreme Court.

We do not want to be critical, but the second decision the Supreme Court rendered was based upon the 1941 Amendment in the exact language as in the prior decision. The language of the Act is plain, clear and unambiguous, and the court apparently deliberately and unlawfully added to the Statute the amendment then pending before the Legislature which subsequently adopted it, so that by so deciding the Court made the 1947 Act, an *ex post facto* law, and accomplished the further purpose of avoiding entering a final judgment as to the other defendants thereby hindering Reiter in

appealing to this court. We respectfully submit that this court's decision in *Gospel Army* v. *City of Los Angeles,* reported in 67 Supreme Court Reporter Advance Sheet July 1, 1947 #15, page 1428, and your other decision in *"Rescue Army, et al.,* v. *The Municipal Court of the City of Los Angeles,* in the same Advance Sheet on page 1409 clearly indicate that this court is not bound by the mere fact that the Supreme Court of Illinois did not make it a final order as to the other defendants, but that you can go into the question as to whether or not said order should have been a final order if the State Statute on practice had been followed and surely under the circumstances in this case, the order entered by the Supreme Court reversing and remanding as to certain other defendants is not in accordance with the Statute in force and in vogue at that time, nor the law in force at that time. Therefore we submit that the decision as to the other defendants, should be construed as a final order by this court, there being no dispute but what the order as to Palmer, is a final order.

We further contend that by the Supreme Court of Illinois applying the Act of 1947 to its last decision in this case, regardless of the subterfuge used by it in its language, taking into consideration its former *Kanauske* decision, *supra,* and even the former decision in this case wherein it devoted nine pages to maintain the construction of this Statute, that by such action it also has violated Reiter's Constitutional rights under both the State and Federal Constitutions, wherein it was expressly provided, that no *ex post facto* law should be adopted. It is a well understood principle of law that you cannot accomplish indirectly what you cannot accomplish directly.

VIII and IX.

A casual reading of the pleadings in this case involving Palmer, and more especially the only sworn statement that has ever been made by Palmer, which is his sworn answer, conclusively shows that he took the property of Reiter without any consideration. As a matter of fact his answer states (Record 87, Abst. 81):

> "But if the same was signed by the plaintiff, his signature thereto and his delivery thereof, were entirely voluntary on his part and were done by the plaintiff for the purpose of carrying out the plan of attempting to save Casualty Company from liquidation which had been suggested by said Assistant Attorney General."

So on his own sworn statement Palmer accepted the property of plaintiff. The record is full of facts as to how he took it, but for the sake of argument we find it needless to cite any law to your Honors, that where a man takes property of another, without consideration, for the purpose of pretended rehabilitation, he surely must account for the property so taken and the decision of the Illinois Supreme Court in this case totally disregards the evidence the findings of the Appellate Court thereon, and releases Palmer of any accounting whatsoever, even though the prayer of the Bill is for such an accounting. These are clear violations of Reiter's Constitutional rights as he was the *cestui qui trustent* of that trust. Of course the situation is aggravated a great deal more taking into consideration the record of threats of criminal prosecution, duress, fraud, coercion, extortion and intimidation that was used, and further the question of what occurred while Palmer was Trustee and in complete control of the holding company stock and the Casualty Company stock of Reiter.

The fact that his own selected and appointed employees acquired it while in his employ under his rules and regulations, which stated that they could not do anything without his written approval. Therefore he was doubly a trustee, and the record discloses what happened to Reiter's property under his said trusteeship. The conservator and his attorney acquired it themselves without one cent of consideration or one share of stock to him and the Supreme Court's final decision, not only sanctions this illegal taking of Reiter's property but releases Palmer of any and all obligations to account to Reiter for the property so taken by him when the record shows Palmer completely ignored Reiter and his counsel during his entire trusteeship. We charge that the final order of the Supreme Court made as to Palmer is in direct conflict with the provisions for "due process of law" provided in both state and Federal Constitutions, and such denial of itself gives this court complete jurisdiction to issue the *Writ of Certiorari* sought by Reiter herein.

Reflect for a moment on the fundamental laws established by our Constitution of the United States, Section 1, Amendment 14:

> "Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person in its jurisdiction the equal protection of the laws."

Section 19, Article II of the Illinois Constitution provides:

> "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation. He ought to obtain by law, right and justice freely, without being obliged to purchase it completely without denial, promptly and without delay".

The order of the Supreme Court of Illinois, in discharging Palmer from liability to account under the written evidence in this case, as well as the undenied oral testimony, really should make us all more than reflect on the enormity of this decision, especially after reading these fundamental statements of our forefathers' ideas of justice and of free men's rights. Of course this court must realize that this order clearing Palmer of all liability to account, unless this court grants this petition for certiorari, deprives Reiter of any and all relief as to Palmer, the man who took from Reiter his properties under extortion and intimidation and the man who had charge of those who were administering it under his direction and who appointed them. This decision of the Illinois Supreme Court is just not compatible with the Constitutional rights of American citizenship, besides the hardships Reiter has endured in his thirteen years of litigation. There is no need for the citations of any decisions under such a state of denied rights as this record shows.

X.

We are most fortunate in having a record here that is undisputed, the case having been by the defendants submitted on its merits and as no evidence was offered by any of the defendants, and although we know it is a burden, we must ask this court, especially in view of the facts and law found and set forth by the Appellate Court, and in view of the facts set forth by the Supreme Court itself in its first decision which are both very much in agreement, on law and fact on the question of conspiracy that was alleged and proven, to obtain from Reiter his control of this insurance company, with the exception that the Supreme Court in its first decision does not hold Palmer as a conspirator, but relieves him

by the following unwarranted statement in the face of plaintiff's evidence; "There is no direct evidence that Palmer conspired with anyone." We meet this issue later on; and just try to justify it by the further statement of the Court:

> "Upon the record in this case the acts and conduct of Palmer's assistants and subordinates cannot be too strongly condemned. That an official of an insurance company, even though he had violated the law, under the circumstances disclosed by the evidence in this case, should be subjected to the treatment which plaintiff received at the hands of those entrusted with the administration of the Department of State Government, is intolerable".

Well Palmer was the only representative of the State Government and under his sworn admissions of his acts, how can a court find he was not a conspirator that defied all rules applicable to himself and still say Palmer was in no way a party to a conspiracy. The fact cannot be denied that Reiter had an insurance company approved by this man Palmer as late as February 1933 in writing, as having a surplus of Thirty Thousand ($30,000.00) Dollars at the height of the depression; that Barr was a minority stockholder, dissatisfied, and Fitzgerald was his lawyer to obtain relief by reason of said dissatisfaction; that Palmer was appointed Insurance Superintendent a few months prior to the instance that occurred here, and was a very good friend of Fitzgerald as the evidence shows. The salutation used by Fitzgerald was "Ernie" and what took place in Palmer's office is not denied, and as a result of the conduct these two, this disgruntled stockholder and his lawyer, who had no interest in this company before this date, whom Palmer appointed through, by and with Palmer's approval and consent, became the complete owners and in control of this insurance company in less than five months, and still under

the rules of evidence that made and established the proof of conspiracy by Palmer, the Supreme Court of Illinois, totally disregards the evidence, the law establishing such a conspiracy but vents its disapproval of the conduct of Palmer's assistants and subordinates who could not have so carried on without Palmer's approval of their actions that the Supreme Court terms "intolerable" in that respect and discharges Palmer. Such decisions of a State Supreme Court do not appeal to just plain common sense or honesty.

Bear in mind even after making a statement as we have just quoted, when Palmer's very rules and regulations provided that his Conservator and attorney for Conservator should not do anything without his approval in writing, and it was all done during the five months that he was in complete charge of the Company under these rules and regulations, and in addition to these rules and regulations he had control of all of Reiter's interest in said company by written assignments from Reiter entrusted to him obtained in a manner which the evidence shows conclusively, but the only denial we have is Palmer's sworn answer, which pleads that he took Reiter's property as a voluntary contribution by Reiter, for the purpose of rehabilitation.

It must be borne in mind that there was only one man that could accomplish what was accomplished in this case and that was Palmer, by reason of being the supreme head of the Department of Insurance, and to discharge him from all liability as conspirator and as a trustee, is absolute evidence of the violation of Reiter's Constitutional rights that he has continually urged and as he alleged in his complaint.

XI.

We know this court is burdened with questions of law, and should not be burdened with questions of fact, but this is one case where the questions of fact must be considered to properly apply the law. The Appellate Court found the facts as to threats of criminal prosecution, fraud, duress, coercion, extortion, intimidation and conspiracy, but the final decision of the Supreme Court completely ignores this fact and each of these facts and completely releases Palmer of any liability, although he was the recipient of Reiter's property by reason of these facts. The Court's final judgment relieves Palmer of any liability to account to Reiter therefor, even though he admitted that he transferred these interests that he had accepted without consideration, without consulting with Reiter or his attorney, or any agent thereof, without any legal authority. Therefore it is incumbent upon this court to read and consider these admitted facts, and to realize that Reiter has been deprived of his property without due process of law and in violation of his Constitutional rights, both State and United States, which we realize it to be the duty of this court to protect, when the Supreme Court of Illinois, so totally disregards such rights of a citizen.

Having completed our argument on our errors relied upon we desire to comment on reasons relied upon for allowance of this writ, and we realize it is easy to criticise public officials. We having stated herein in our reasons, we think this court has never had presented to it a more flagrant violation of the Constitutional rights of a citizen, and we state that it undoubtedly has been brought about by reason of the fact that Illinois officialdoms are involved, and after all, our Supreme Court is but a member of that family. No doubt it is a hardship

and a hard matter to find a public official guilty of conspiracy, fraud, duress, coercion, extortion and intimidation as the evidence shows in this case, but there are times when we must meet that duty and this record reveals a condition where a citizen was deprived of all of his property, and in less than five months it was delivered to officials of Illinois, or to appointed officials of a Head of a Department of Illinois, and this property has grown into a Two Million Dollar concern, and its fruits and prosperity has been and is now being shared by these very appointees, without any added capital and through circumstances for which there is absolutely no legal excuse.

This would be bad enough, but we have a public official violating the mandatory duties of the Statute to accomplish in doing something indirectly where there was a direct Statute ordering him to do otherwise. This makes it absolutely inexcusable as a public official or otherwise. Therefore we have said in our reasons, that this citizen Reiter, is entitled to a review of this case by a Court such as this Honorable Body, removed from the site of Illinois officialism, and free from its natural sympathetic conditions and influences.

One of these sympathetic conditions is clearly brought out in this matter by the fact that even though the People of the State of Illinois are not involved in this litigation or a party thereto, still we have Palmer represented from the first start of this litigation to the date hereof, some thirteen years of litigation, by the Attorney General of the State of Illinois at the expense of the State of Illinois, over the continual objection of Reiter. We further have the fact that this record discloses that Palmer, Barr and Fitzgerald were allowed an appeal by the Supreme Court without any bond whatever, although the Appellate Court in allowing them a Certificate of Im-

portance, required a bond of $100,000.00 from each of the defendants, but only the Casualty Company furnished a bond on its individual appeal on its Certificate of Importance.

The above situation is serious enough, but the question of this Supreme Court's opinion standing for all time as the Law of Illinois in view of the findings of fact found by the Appellate Court, is opening the door for every public official of Illinois to assume governmental powers and do similar acts, and expect to be relieved from liability therefrom by reason of the decision rendered by the highest court of Illinois in this case. This alone should require this court to review this record for the purpose of not only protecting Constitutional rights, but a matter of establishing and confirming the public policy of the State of Illinois.

We quote, with approval, from a recent dissenting opinion of Mr. Justice Murphy in the case of *Oklahoma Press Pub. Co.* v. *Walling, supra* (66 Sup. Ct. 494):

> "Administrative law has increased greatly in the past few years and seems destined to be augmented even further in the future. But attending this growth should be a new and broader sense of responsibility on the part of administrative agencies and officials. Excessive use or abuse of authority cannot only destroy man's instinct for liberty but will eventually undo the administrative processes themselves. Our history is not without a precedent of a successful revolt against a ruler who 'sent hither swarms of officers to harass our people.' • • • A people's desire to cooperate with the enforcement of a statute is in direct proportion to the respect for individual rights shown in the enforcement process. Liberty is too priceless to be forfeited through the zeal of an administrative agent."

We have said that we would call your attention to the acts of Palmer whereby he was directly involved in this acquiring of plaintiff's property in a period of five months, bearing in mind that Palmer by the order as it now stands by the Supreme Court, is completely relieved of all responsibility and even of an accounting.

a. Fitzgerald's addressing Palmer as "Ernie" from the very beginning, and Fitzgerald's appointment by Palmer as attorney for his so-called conservator, and there are many other acts and statements in this record showing the friendship existing between Fitzgerald and Palmer, and Fitzgerald professing to be a friend of Palmer and Palmer never denied it.

b. Palmer introduced everyone to his assistants and directed that they would have complete charge of this matter (Abst. 286, Rec. 315).

c. The demand for $100,000.00 or the threat of deprivation of Reiter from his company, the first day this matter arose when there was only a $15,000.00 pretended discrepancy (Abst. 288, Ex. 2, Abst. 534).

d. The written demand signed by Palmer, no denial, for the $100,000.00, to be furnished within 48 hours (Abst. 534, Ex. 2).

e. Palmer's personal refusal to extend the time for securing this $100,000.00 beyond the forty-eight hours at the height of the depression (Abst. 379, Rec. 711).

f. The unlawful written direction signed by Palmer, never denied, divesting Reiter of his office as President, Director and control, of his insurance company, in which he held the majority stock, the same conditions being true of the domestic holding company (Abst. 550, Ex. 25).

g. The act of appointing a disgruntled minority stockholder during the depression when thousands of disin-

terested executives were clamoring for such positions. This appointment was over the signature of Palmer (Abst. 550, Ex. 25).

h. The evidence which shows that before the appointment was made, that the assistants accompanied by Fitzgerald left the room to go into Palmer's office and returned and stated that Palmer had appointed Barr, has never been denied by Palmer, and of course this statement was followed by his written appointment (Abst. 550, Ex. 25).

i. The human element that no assistant of a public official who had been in office but a few months, would have had the audacity to make these decisions and appointments without Palmer's knowledge, approval, authority and direction.

j. The evidence of the demands made upon Reiter for all his stock, insurance company and the holding company, and the acceptance of the same by Palmer by written assignment, and Palmer's acts thereafter of reassigning it to others than Reiter, is all undenied (Abst. 473, Ex. 97; Ex. 62 to 68 and 71; Abst. 383 to 386, 555 to 558, Exs. 31 to 33; Rec. 404, Abst. 303).

k. The evidence showing Reiter and his counsel refusing to deliver the assignments of this stock to Palmer's assistants, but sent the assignments to Palmer direct (Abst. 384-6; Rec. 733-4).

l. Counsel for Reiter's letter to Palmer personally and produced by Palmer's counsel upon the hearing, warning him of the possible loss of Reiter's stock through the acts of his assistants and Palmer's ignoring of said warning (Abst. 386, Rec. 735 *et seq.*, Ex. 98, Abst. 569).

m. The evidence, not denied, that Palmer personally attempted to force a consolidation in a statement that

he was in control of a casualty company, and could do as he liked (Abst. 454, Rec. 1064).

n. The testimony that Palmer personally negotiated with a witness with reference to said witness securing control of the Casualty Company was all right, and that any agreement or plan made by his assistants would be carried out by him, Palmer (Abst. 438, Rec. 1014; Abst. 454, Rec. 1022), and in this same conversation this assistant offered to deliver 51 per cent or the control of this company to said witness for $125,000.00, but Barr was to be retained as president of the company (Abst. 441, Rec. 1022).

o. The record shows undisputedly that at this time Palmer was the assignee of Reiter's stock through assignments made to him by Reiter (Abst. 383-386, Exs. 62, 63, 64, 65, 66, 67, 68 and 71; Abst. 304. Rec. 420 *et seq.* Abst. 555-558, Exs. 31, 32, 33. Abst. 303, Rec. 404 *et seq.*).

p. Palmer's personal activities in the consolidation and his consent thereto by his signature, never denied, show that Reiter had been deprived of his interest therein, and was no longer an officer, stockholder or otherwise, and received no notice of any actions of Palmer (Abst. 466, Rec. 1101 *et seq.* Ex. 83, Abst. 560, Ex. 135, Abst. 592).

q. The record shows that Palmer knew what Reiter's interests were at the time they were taken over by him five months before as he was holding these stocks by reason of written assignments to him and subsequently made personal reassignments (Abst. 385, Rec. 733, Ex. 97, Abst. 568). These conditions are also shown in Palmer's answer sworn to (Abst. 65, Rec. 69-70.)

r. Counsel for Reiter's letter to the Governor complaining of Palmer's actions, and the Governor's reference of that letter to Palmer and his ignoring of said letter until September 29, 1933, eight days before the

release of the conservatorship and his, Palmer's, approval of said company as consolidated (Abst. 392-3, Rec. 755-763).

s. The human element of Palmer retaining his said assistants during his entire term of office, even after the complaint had been filed setting forth the charges now before this court.

t. The first decision of the Supreme Court states that the real proof of conspiracy may be evidenced only by the acts of the parties, and the above are the personal acts of Palmer and are undenied.

We have hesitated to make this statement, but we owe a duty to our client also to show the caliber and calloused condition of the defendants in this case. The record shows undisputedly, by a disinterested witness (Abst. 468-9, Rec. 1111 to 1114), that a $2000.00 check was drawn to the order of Fitzgerald, and Barr stated to said witness that it was not for Fitzgerald, but for the "Wolves at the State House", in connection with this matter.

Not one of these defendants, two of them lawyers of the Illinois Bar, Palmer and Fitzgerald, and one of them a public official, and the one who was alleged to have made the remark, was Barr, former conservator for Palmer, this public official, and they did not even feel as though they should present any evidence to deny these charges, and never took the witness stand to offer any explanation therefor, but under the statute submitted their cause on its merits with those statements undenied. This is one of the reasons we have set forth as relying upon for the allowance of the Writ of Certiorari in this cause, so that its final decision should be by a court far removed from Illinois officialdom and influences.

Respectfully submitted,

JOHN A. BROWN,
Attorney for T. H. Reiter,
Petitioner.

APPENDIX.

OPINION OF SUPREME COURT OF ILLINOIS of January 22, 1947.

Docket Nos. 29660, 29662, 29664, 29668, Consolidated—Agenda 26—November, 1946.

T. H. Reiter, Appellee, v. Illinois Casualty Company *et al.*, Appellants.

Mr. JUSTICE SMITH delivered the opinion of the court:

This case originated in a suit filed by appellee in the superior court of Cook County, It involves only one decree. The superior court, on motion of the defendants at the close of the plaintiff's evidence, entered a decree dismissing the complaint for want of equity. On appeal to the Appellate Court that court affirmed the decree as to one defendant. As to all other defendants the Appellate Court reversed the decree and remanded the cause with directions. From the judgment of the Appellate Court, Illinois National Casualty Company prosecuted an appeal on leave granted by the Appellate Court. Claude H. Barr, Arthur M. Fitzgerald and Ernest Palmer, upon leave granted by this court, have perfected separate appeals. These separate appeals have all been consolidated in this court.

The cause is a suit for accounting and the return of certain stock of the Illinois National Casualty Company, allegedly taken from plaintiff by duress and coercion by defendants Barr, Fitzgerald and Palmer. The Casualty Company and the Fidelity and Deposit Company of Maryland, surety on Palmer's official bond as Superintendent of Insurance of the State of Illinois, were also made defendants. The cause was referred to a master. At the

close of plaintiff's evidence each defendant moved for a finding in his favor and a report recommending the allowance of the motions and the dismissal of the amended complaint for want of equity. The master reported, making certain findings of fact. He recommended the allowance of the motions and the dismissal of the complaint. The trial court approved the master's report, allowed the several motions and dismissed the complaint.

The controlling facts may be summarized as follows: Plaintiff, T. H. Reiter, has been in the insurance business since 1911. From 1918 to 1930, he managed the Reciprocal Insurance Exchange; in 1930, on the advice of O. E. Winzer, an insurance accountant who had handled the work of the Exchange for many years, he organized the Illinois National Casualty Company with a capital stock of $200,000 and $40,000 surplus. It was approved by the State Department of Insurance in July, 1930. Plaintiff owned about 80 per cent of the stock of the Casualty Company, having paid for it in full. Shortly after the Casualty Company was organized, plaintiff organized the U & I Service Company to act as a general agent for the Casualty Company in other lines of insurance. The Service Company was owned entirely by the plaintiff.

During approximately the same period, appellant Claude H. Barr was operating the Eastern Underwriters Corporation, which was attorney in fact for the Eastern Automobile Insurance Underwriters, a reciprocal exchange similar to that operated by plaintiff before the organization of the Casualty Company. Barr was president of the Eastern Underwriters Corporation and owned 130 of the 250 shares of its outstanding stock. Winzer was an accountant employed by the Eastern Underwriters Corporation, as well as by the Casualty Company. The Eastern Underwriters Corporation had a large volume of business, but its financial condition was unsound.

Early in 1931, Barr called some of the directors together and informed them that unless something was done the corporation would be unable to file a statement. Barr suggested a merger and told them that Winzer had a small company in Chicago (the Casualty Company) which was in the opposite position from that of the Eastern Underwriters Corporation, in that it was strong financially but did not have much business. Barr was given authority to go ahead with plans for a merger, if one could be arranged.

About the middle of March, 1931, Winzer arranged a meeting between plaintiff and Barr for the purpose of considering a merger of Eastern Underwriters Corporation and the Casualty Company. The proposed merger was represented by Barr to plaintiff as being mutually advantageous, as it would combine Eastern's large volume of business and agency distribution with the Casualty Company's capital structure. It was proposed that the Casualty Company should emerge as the dominant company and that upon consolidation plaintiff should have approximately 55 per cent of the stock, Barr 40 per cent, and Winzer 5 per cent. Winzer suggested the organization of a holding company which could control the Casualty Company and its affiliates. The holding company was to take over and liquidate certain loans the plaintiff then had at the banks and with Baker Walsh Company. Barr was to obtain all of the holdings of the Eastern Underwriters Corporation, and the assets and liabilities of the Eastern exchange were to be taken over by the Casualty Company. This general plan of merger was agreed upon, and while it was never reduced to writing, Winzer was instructed to work it out, taking such steps as were necessary to liquidate the Eastern Underwriters Corporation and otherwise consummate the transaction. The holding company was to be named the Finance and Investment Company.

On March 30, 1931, plaintiff went to Springfield to meet with Barr and his associates. Barr had some difficuty in getting all of the stockholders of Eastern to agree to the merger, and finally had to buy out two of them for $6000 and $7000, respectively. The Finance and Investment Company had not yet been organized, and Winzer persuaded Reiter to sign two notes given in payment for the stock of the dissatisfied Eastern stockholders. The notes were subsequently paid by the Finance and Investment Company. Winzer then took 4000 shares out of plaintiff's 14,810 in the Casualty Company and gave 1800 to Barr's associates and 1950 to Barr, in payment of their stock in Eastern at a 15 to 1 ratio. This amounted to a payment of $29,250 to Barr and $28,000 to the others, and left plaintiff with about 11,000 shares of Casualty Company stock. Of plaintiff's remaining shares, 810 were held by him and 10,100 shares were on deposit at the Lake Shore Trust and Savings Bank and at the Cosmopolitan State Bank, as collateral to secure loans. It was these loans which the Finance and Investment Company was to pay, along with plaintiff's loan from Baker Walsh Company. Pending completion of the merger it was agreed that plaintiff could continue to make payments on the loans and receive a credit from the Finance and Investment Company in the amount of such payments made. By May, 1933, plaintiff's credit for these payments had reached approximately $25,000.

The consummation of the merger was delayed by Winzer's inability to wind up the business of the Eastern Underwriters Corporation, particularly with regard to the payment of claims which were in litigation. The Finance and Investment Company was organized, however, with plaintiff as president and Barr as secretary. Winzer also organized the Equitable Adjustment Company, a corporation designed to handle the claims of the Casualty Com-

pany and others. By stock transfers the Finance and Investment Company became the owner of all except the qualifying shares of stock in Eastern Underwriters Corporation, Equitable Adjustment Company and U & I Service Corporation; the stock in the Finance and Investment Company was in turn held by Barr, (16,000 shares,) Winzer, (2000 shares,) and plaintiff (22,000 shares.) The consideration for the issuance of the stock in the Finance and Investment Company, as reported, included, among other things, 14,770 shares of Casualty Company stock, which was the stock originally held by plaintiff and which was valued at $295,400. But, as previously noted, 10,100 shares of this stock was posted with the two named banks, as collateral for plaintiff's loans and, therefore, did not actually come into the possession of the Finance and Investment Company.

By the fall of 1932, with the merger still hanging fire awaiting Winzer's liquidation of the Eastern's liabilities, Barr began to press for an early conclusion of the matter. Barr then employed appellant Fitzgerald as his personal attorney and began a controversy with plaintiff over the management of the Casualty Company and the completion of the merger. In December, 1932, the Insurance Department made an examination of the Casualty Company for the period from December 1, 1930, to November 30, 1932. The examiner, Neil Russell, reported that the Casualty Company had paid the Equitable Adjustment Company an excess of $17,465.50; that the administrative expenses were excessive and the surplus of $15,795.31 was small; but that it paid claims promptly and equitably and its loss ratio was normal. On March 1, 1933, the Casualty Company filed its annual report for 1932 with the Insurance Department. This report was signed in blank by plaintiff as president, and by C. L. Morris, who was secretary of the company. It was then

filled in by Winzer and forwarded by him to the Department at Springfield. The report listed among the securities held by the Casualty Company $15,000 in Liberty bonds. On May 8, 1933, Russell came in to see the plaintiff and asked to be shown the Liberty bonds. Plaintiff told him that the company had no such bonds and that Russell knew it, having made a check for the Department in January. He referred Russell to Winzer for an explanation as to how the statement got into the annual report, because he (plaintiff) knew nothing about it. The following morning plaintiff received a telegram from the Insurance Department advising him to appear at the Department at 10 A. M. on May 10.

In response to this telegram plaintiff went to Springfield on May 10, accompanied by Albert Hassell, his attorney. In Springfield they met Barr, Fitzgerald and Morris, and together they all went over to the Insurance Department. At the Department they met Palmer, who was introduced to them by Fitzgerald; Palmer in turn introduced Chas. S. Conover and Raymond T. Nelson, who he said would take charge of the meeting, and left. Conover and Nelson then proceeded to interrogate plaintiff about the false statement in the annual report, and told him he was guilty of a criminal offense for filing such a report. Fitzgerald talked of shortages in plaintiff's accounts, but could not specify any; there were no copies of records or accounts of shortages produced or shown to plaintiff. Plaintiff was asked if he could make immediate arrangements to add some finances to the company, to which he replied that he would try. They then told him he would have to have $100,000 in cash or government securities added to the Casualty Company surplus by May 12, and also that he must bring Winzer in on that day for interrogation. Plaintiff protested that he could not raise $100,000 in 48 hours, but Nelson told him

it was an order. During the conversation some one of those present, referring to the report which had been filed, remarked: "We are damn fools to fool with this fellow here. We should take him right to the government and prosecute him for sending it through the mails." Finally, Fitzgerald, Conover and Nelson excused themselves and said they would have to talk to Palmer; they returned shortly with a typewritten letter ordering the officers of the Casualty Company to appear at the Insurance Department on May 12, with a written plan for reorganizing and rehabilitating the company, including an immediate advance of $100,000 to the company's surplus. They were also ordered to have Winzer present at the same time. The letter was purportedly signed by Palmer as Superintendent of Insurance, although the initials "RTN V" in the lower left-hand corner indicate that it was dictated by Nelson. After the meeting, plaintiff and Hassell returned to the hotel where Barr and Fitzgerald soon joined them. Plaintiff was completely exhausted and Fitzgerald told him not to worry, that he knew "Ernie" pretty well and would see if they could not work out some kind of a job for him in Chicago. Plaintiff and Hassell thereafter returned to Chicago.

On May 11, plaintiff and Hassell attempted to get an extension of time in which to raise the $100,000, but were unsuccessful. They returned to Springfield on May 12, as directed. At that time the same group was again present. Winzer and an Assistant Attorney General were also present. Nelson and the Assistant Attorney General took charge of the meeting. Winzer was asked about the bonds and also about some of the other securities of the Casualty Company. They asked plaintiff if he had the additional $100,000, and he told them that he did not; they then stated that plaintiff would have to be divested of the management of the company. Nelson stated that a bill had just been passed by the legislature which would au-

thorize Palmer to appoint a conservator for the Casualty Company, and that the Department had decided to appoint Barr. He further stated that plaintiff was bound to do everything the Department ordered him to do, or be liable criminally; and that after the company was rehabilitated and reorganized, plaintiff's interests would be returned to him. Plaintiff and Hassell were sworn to secrecy about this proposition, and were told to go back to work just as if nothing had happened. At this juncture Fitzgerald, Nelson and the Assistant Attorney General excused themselves to talk to Palmer. When they returned Nelson announced the appointment of Barr as conservator for the Casualty Company with complete authority to manage and operate it. It was also announced that the appointment was only for thirty days, during which time all parties were to try to work out a solution for the reorganization of the Casualty Company. The appointment was made official by a written order issued the next day, May 13, 1933, by which Barr was appointed conservator; all assets of the Casualty Company were ordered deposited with the Superintendent of Insurance; all transfers of assets and all payments of officers and employees were to be made only with the approval of Palmer; all premiums received were to be invested in government or State securities; and Barr was ordered to furnish a bond in the amount of $50,000. The initial appointment was for thirty days. It was subsequently extended for three additional thirty-day periods. The order and the extensions were approved in each instance by the Governor.

Plaintiff returned to Chicago with Hassell on the evening of May 12. The next morning they went down to the office of the Casualty Company, although the plaintiff was in poor physical condition. Barr was there and had taken charge of the office when they arrived. Plaintiff's condition was such that he was forced to spend most of

the day resting; and while he was doing so, O. O. Lane, one of the company's stockholders, came in to see him and was informed by Barr that "The old man has passed out," and that he was "clear out of the picture." In the afternoon plaintiff accompanied Barr to the bank and turned over to him the securities owned by the Casualty Company; he then took his personal belongings out of his desk and left the office. Plaintiff never returned to the office after that time.

About June 6, 1933, plaintiff went into the Lake Shore Trust and Savings Bank and saw Fitzgerald sitting at the president's desk. The president called plaintiff over and told him that Fitzgerald was trying to pick up his stock, but that the bank would try to protect him. Fitzgerald got up and walked away without speaking to the plaintiff. Plaintiff paid $300 on his note on June 7, leaving a balance of $2200 due. On June 10, 1933, Barr, as conservator of the Casualty Company and secretary of the Finance and Investment Company, wrote a letter to the Lake Shore Trust and Savings Bank advising them that the 5050 shares of Casualty Company stock, held by that bank as collateral for plaintiff's loan, were the property of the Finance and Investment Company, and should not be released to anyone without first notifying Barr. Barr also stated that if the bank wanted to clear out the loan he would try to get authority from the Department of Insurance to pay the note. A similar letter was sent the same day to the Cosmopolitan State Bank, where another 5050 shares of plaintiff's stock were pledged as collateral. In the meantime, plaintiff had been ordered by letter dated June 9, 1933, purportedly signed by Palmer, but apparently written by Nelson, to appear on June 12, 1933, at the Chicago office of the Insurance Department for a hearing before one Hiram McCullough. Plaintiff, Winzer and Hassell, in response to this letter,

appeared. McCullough demanded that plaintiff turn over his stock in the Casualty Company and its affiliates to Palmer. Plaintiff and Hassell protested, stating that the stock was plaintiff's own individual property. McCullough said he had instructions "from the boss" and they would turn the stock over "or else." Upon being assured that the stock was to be taken over by Palmer in his capacity as Superintendent of Insurance, Hassell advised plaintiff to do as McCullough requested. He accordingly executed the necessary assignments and transfers to transfer the stock to Palmer. These assignments were delivered to the Department by Hassell. On June 23, 1933, the Lake Shore Trust and Savings Bank sold the 5050 shares of Casualty Company stock held by it as collateral to Fitzgerald for $2500. The money received was applied to the payment of plaintiff's loan. A stock certificate was subsequently issued to Fitzgerald for these 5050 shares on September 21, 1933. The 5050 shares of plaintiff's stock held by the Cosmopolitan State Bank were sent, at Fitzgerald's request, to the Marine Bank in Springfield with a sight draft drawn on O. C. Moore, for delivery to Moore upon payment of the draft. The draft was paid and the stock delivered; and on September 24, 1933, a new certificate was issued in the name of O. C. Moore, and eventually that certificate was turned in to the Casualty Company in connection with a later merger. However, O. C. Moore testified that he knew nothing of the transaction, did not pay the sight draft and did not receive the certificates. The identity of the party who posed as O. C. Moore is, so far as this record is concerned, undisclosed.

By letter dated June 26, 1933, plaintiff was again directed to appear at the office of the Insurance Department on June 28, 1933. Hassell went with him; Nelson, Russell, Barr, Winzer and Fitzgerald, and the same Assistant

Attorney General, were also present. Nelson took charge, and announced that they wanted to try to work out a dissolution of the Finance and Investment Company, Equitable Adjustment Company, and U. & I Service Company before July 1, when the corporation year ended. The dissolution of the Finance and Investment Company could not be effected, however, so long as its liability of $25,000 to plaintiff was still outstanding. Fitzgerald stated that he did not think the $25,000 was actually due the plaintiff and that plaintiff was short $80,000 in his accounts with the Casualty Company. There were no books present, and Fitzgerald could not specify where the claimed shortages were. Plaintiff protested and said the money was due him as a part of the original agreement whereby he was to turn in his stock and the Finance and Investment Company was to pay off his loans at the banks; that 4000 of his shares had been used to acquire the stock of Eastern Underwriters that Barr was supposed to turn in. Winzer confirmed these statements. Fitzgerald then argued that plaintiff had failed to turn in his stock because it was pledged as collateral and that plaintiff had, therefore, breached his contract. Nelson said that plaintiff had to release the $25,000 credit, or else the Department would throw the Casualty Company into receivership; that plaintiff had made a false report to the Department, and had shortages; and that "I am running this show" and "you have got to do as we want you to do." After about an hour of wrangling, Hassell and plaintiff retired from the room. When they returned he proposed that plaintiff, Barr and Winzer all turn their holdings in the companies over to the Department of Insurance, which could reorganize them as it saw fit, and when that was accomplished the three could have an accouting among themselves to determine what their respective interests were. Barr and Winzer agreed to the proposition. The

meeting adjourned so that such an agreement could be prepared. That afternoon they met again and plaintiff signed the papers. As they left, Hassell asked about the signing of the agreement by Barr and Winzer. He was told by Nelson, "You forget I am running this thing and you are not running it." At the time of this meeting, plaintiff did not know that his stock held by the Lake Shore Trust and Savings Bank had been sold to Fitzgerald; he did not learn that this had been done until he returned to Chicago.

How the stock of the Casualty Company was divided after the meeting of June 28, 1933, is explained in a letter written by the Department to Hassell on September 29, 1933. It appears that the Finance and Investment Company was, for the purposes of reckoning, assumed to have 14,242 shares of Casualty Company stock, which was to be distributed 55 per cent to plaintiff, 40 per cent to Barr, and 5 per cent to Winzer in accordance with their holdings of Finance and Investment Company stock; that actually the Finance and Investment Company had in its possession 3337 shares on June 28, 1933, consisting of 1950 shares belonging to Barr, 175 belonging to Winzer and 1212 held in its own name; that of the other stock, 805 shares were held by the Superintendent of Insurance, which had been assigned to him by the plaintiff as already indicated, and 10,100 shares belonging to plaintiff which were hypothecated at the two banks; that upon dissolution of the Finance and Investment Company, the 1212 shares held in its name were distributed 1061 shares to Barr and 151 shares to Winzer, and the 805 shares held by the Superintendent of Insurance were turned back to the Casualty Company and divided 704 shares to Barr and 101 shares to Winzer; that Reiter, Barr and Winzer agreed in the papers signed June 28, 1933, that if and when Reiter recovered his hypothecated stock, he

would deliver 1982 shares to Barr and 285 shares to Winzer, which would leave plaintiff with 7833 shares, Barr 5697 shares, and Winzer 712 shares, in accordance with the 55%-40%-5% ratio. It should be remembered, however, that plaintiff had not been informed of Fitzgerald's purchase of 5050 shares of his stock from the Lake Shore Trust and Savings Bank when he signed the agreement on June 28, 1933, which was five days after Fitzgerald had purchased the stock. By the sale to Fitzgerald and the subsequent sale to whoever represented himself as O. C. Moore, in August, 1933, together with the transfers of stock made by the Insurance Department as above noted, plaintiff was divested of all of his interest in the Casualty Company.

In July, 1933, Palmer called together the officials of the Illinois National Casualty Company, the Illinois Casualty Company, and the United States Underwriters Company, a reciprocal exchange at Jacksonville, Illinois, and suggested a merger. The Illinois Casualty Company was not interested, but negotiations were continued by the other two. In August, 1933, while the possibility of a merger was being explored, William Heise, who was desirous of obtaining control of an Illinois Company, contacted Fitzgerald concerning the possibility of purchasing the Illinois National Casualty Company. Fitzgerald took him to the Insurance Department where Nelson told him about the Casualty Company and the proposed merger with the Jacksonville reciprocal. Heise talked to Palmer, who told him that Nelson had the Casualty Company in charge and anything Nelson worked out would be all right. Heise discussed the merger with Nelson and was assured that the reciprocal would join, because "we have got them where we want them." Heise objected to some of the Casualty Company assets and Nelson told him not to worry, that Palmer would be in

office for four years and if Heise bought the Casualty Company he would never be disturbed. Heise finally turned down the purchase of the Casualty Company, but the merger with the reciprocal did go through on October 7, 1933. Barr became president of the consolidated company. Barr resigned as president and sold his stock in 1937, but remained on the board of directors for another year.

In the above narrative we have set out only the salient facts. Many other facts of similar import are shown in the record, which to set out in detail would unnecessarily extend this opinion and serve no useful purpose.

The charge in the complaint is that appellants entered into and carried out an unlawful conspiracy by which they obtained from the plaintiff, unlawfully, and by coercion and duress, his property, and wrested from him the control of all of his interest in the Casualty Company and its affiliated companies in which he was interested The appellants claim that all that was done by them was within the scope of the authority of Palmer, as Director of Insurance; that what they did was lawful and was done with the consent of plaintiff, and that in any event Palmer is not liable for the wrongful acts of his subordinates.

A conspiracy is defined as a combination or agreement between two or more persons to do an unlawful act, or a lawful act in an unlawful manner. It is not necessarily a formal agreement. It may be a verbal agreement or a tacit understanding. It may be a scheme evidenced only by the acts of the parties. The intent by two or more persons to do an unlawful act, or a lawful act in an unlawful manner, is the first step in a conspiracy. Next follows concurrence of mental intent between the parties to effect a common design or purpose, each to aid the other in the furtherance of the unlawful undertaking. In

Chicago, Wilmington and Vermilion Coal Co. v. *People,* 214 Ill. 421, on page 453, it was said: "Mutuality in the undertaking may be secured without any express agreement, and without a spoken or written word between the conspirators or a meeting of the members of the combine, or their even all knowing each other, or the precise thing to be accomplished or plans for its accomplishment, either in a general way or in detail, being distinctly stated by any member of the combine to any other member. If there is a meeting of minds, brought about in any way, to accomplish the common purpose, the essentials of a guilty combination are all satisfied."

In order to establish a conspiracy the evidence must show the joint assent of the minds of two or more persons to the prosecution of an unlawful enterprise. The combination in a common design to accomplish an unlawful purpose when once established constitutes such unity of action that the acts and declarations of one coconspirator are considered in law as the acts and declarations of the others. (*People* v. *Halpin,* 276 Ill. 363.) It is also the law that a conspiracy may be established by indirect or circumstantial evidence if such evidence is clear and convincing. *Tribune Co.* v. *Thompson,* 342 Ill. 503.

With this preliminary review of the elementary rules of law involved, we come to the consideration of the evidence in the case. We will first consider the evidence as it applies to appellant Palmer. In considering the case as to him we may well disregard the facts occurring prior to March, 1933, although, in the light of after events, they are not without significance so far as appellants Barr and Fitzgerald are concerned. There is nothing in the record tending to show any act on the part of appellant Palmer prior to that date, which is now complained of. The things that were done prior to March, 1933, all tend to indicate that Barr had for some time coveted the acquisi-

tion, for himself and his associates, of the interests of plaintiff in the Casualty Company and those companies affiliated with it. That he was co-operating with Winzer, who was an accountant and trusted employee of the Casualty Company, and was familiar with its business and records, in an effort to accomplish that end, is definitely shown. Winzer was also, at the same time, employed in the same capacity by the insurance companies operated by Barr.

There is no direct evidence that Palmer conspired with anyone. The evidence relied upon by appellee as connecting him with the conspiracy charged is purely circumstantial. His first connection in any transaction with plaintiff was on May 10, 1933. In March, 1933, the annual report of the Casualty Company was filed with the Department of Insurance. The proof shows that plaintiff, who was president of the Casualty Company, and Morris who was its secretary, signed this report in blank before the lists of the various assets of the Casualty Company were inserted in the report. The report was then completed by Winzer by inserting the assets and liabilities and other information required. In this report, as prepared by Winzer, after the signatures of plaintiff and Morris were attached, there was listed in the assets of the company $15,000 in government bonds. Without submitting the report to plaintiff and Morris after it was completed, Winzer forwarded it to the Department. On May 8, 1933, Russell, who was an examiner for the Insurance Department, called upon the plaintiff at the office of the Casualty Company in Chicago. He asked plaintiff to submit to him for inspection the $15,000 in government bonds listed as assets in the annual report, which Winzer had filed. He was advised by plaintiff that the company did not own and never had owned any such bonds. He ex-

plained to Russell how this item of bonds got into the report without his knowledge. The following day plaintiff received a telegram from the Department requesting his appearance in Springfield on May 10, 1933. On that date he appeared, as requested, with Hassell, his attorney. He was also accompanied by Morris and also by Barr and Fitzgerald, whom he and Hassell had evidently met somewhere in Springfield, before reporting to the office of the Department of Insurance. When they reached the Department they met Palmer for the first time. Palmer was introduced to plaintiff and his attorney by Fitzgerald. Palmer then introduced them to Conover and Nelson, who were connected with the Department. Palmer advised them that Conover and Nelson would be in charge of the meeting. Palmer then left the room. After the meeting with Conover and Nelson, at which plaintiff and his attorney, and Barr and Fitzgerald were present, had progressed for some time, Fitzgerald, Conover and Nelson retired, saying they would have to talk to Palmer. Shortly thereafter they returned with a letter to which Palmer's name purported to be signed, as Director of Insurance. The evidence indicates that this letter was dictated and probably Palmer's name signed to it by Nelson. Other than the fact that Palmer's name was attached by someone to this letter, there is no evidence that Palmer ever saw the letter or had anything to do with its preparation. By this letter the officers of the Casualty Company were ordered to appear before the Department on May 12, 1933, with a plan in writing for the reorganization or rehabilitation of the Casualty Company. The letter further demanded that they arrange to advance immediately to the Casualty Company's surplus, $100,000 in cash. They appeared again before the Department on May 12, 1933. The same group, together with an Assistant Attorney General, was present. After

some discussion, Fitzgerald, Nelson and the Assistant Attorney General purportedly retired to talk to Palmer. When they returned, Nelson announced that Palmer had appointed Barr as conservator of the Casualty Company. This appointment was confirmed by a written order entered on May 13, 1933. By this order the affairs of the Casualty Company were turned over to Barr to administer as conservator. The initial appointment of Barr was for a period of thirty days. It was thereafter extended for three successive periods of thirty days each. The order making the appointment and three extension orders were signed by Palmer as Director of Insurance. They were also signed and approved by the Governor.

Much is said in the argument as to the power of Palmer to appoint a conservator for the Casualty Company. He claimed authority to take that action under an act passed by the General Assembly. (Laws of 1933, p. 649.) This act was approved by the Governor on May 11, 1933. It contained an emergency clause and became effective on that date. The title of the act is as follows: "An Act relating to insurance companies and the foreclosure of mortgages held by insurance companies on farms and homes, and providing that, subject to the approval and by direction of the Governor of the State of Illinois, the Superintendent of Insurance may adopt and promulgate rules and regulations affecting the control of insurance companies, and declaring an emergency."

Plaintiff contends that this act did not confer upon Palmer the power to appoint a conservator, and that his attempt to do so was unauthorized. We need not stop to consider the validity of this act of the General Assembly or the powers granted thereunder. Assuming the act of Palmer in appointing a conservator was not authorized by law, the record shows that he acted with the approval of

the Governor and purported to act under the authority of this statute. He believed that he had such power. Obviously the Governor entertained the same view. So far as the record shows, he acted in good faith as a public official. When an unlawful conspiracy is charged against a public official, which necessarily involves corruption on his part, the proof must overcome the presumption of good faith in the proper discharge of his official duties. The rule is that public officials in the performance of their official acts are presumed to act in good faith and with honest motives. *Tribune Co.* v. *Thompson*, 342 Ill. 503; *Hallett* v. *City of Elgin*, 254 Ill. 343.

Unquestionably the officers of the Casualty Company, by permitting its annual report to be filed showing assets which it did not own, had committed an act in violation of law and which subjected the company to receivership and possible liquidation and which also might have subjected the officers individually to criminal prosecution. It must be assumed, and there is no evidence to overcome such assumption, that Palmer, acting in his official capacity as Director of Insurance, believed in good faith that the company should either be liquidated or that its management should be temporarily turned over to a conservator in an effort to work out some plan for its rehabilitation, in order to avoid liquidation. He believed that with the approval of the Governor, under the act of May 11, 1933, he had the power to appoint a conservator. Whether he, in fact, had such power is beside the question here involved. The question here is whether the acts done by him were wrongful and whether proof of such acts is sufficient to show that he was a party to a conspiracy to obtain the property of the plaintiff unlawfully by coercion, duress or other unlawful means. The fact that a public official performs acts beyond the scope of the powers conferred upon him by law is not alone proof that he acted in the

furtherance of an unlawful conspiracy, in the absence of proof that he did not act in good faith.

The only other act relied upon as creating a liability against Palmer is that about June 12, 1933, McCullough, who was connected with the Department of Insurance, demanded of the plaintiff that he assign his stock in the Casualty Company and his stock in the holding company to Palmer as Director of Insurance. Palmer was not present and there is no proof, except the remark of McCullough connecting him with such demand. McCullough told plaintiff that this was the "orders from the boss." The assignments of the stock were made obviously on the advice of plaintiff's attorney. They were mailed by plaintiff's attorney Hassell to the Department. This stock was evidently held by the Department in the assets of the Casualty Company which was then being operated by Barr as Conservator. Later, the Casualty Company, without the consent of plaintiff, was consolidated with the United States Underwriters Company with the approval of Palmer as Director of Insurance. The stock which was assigned to Palmer by plaintiff was then reassigned to the companies by whom it was issued for redistribution in the consolidation or reorganization of the Casualty Company.

We have recounted above every act done by Palmer which is relied upon as connecting him with the alleged conspiracy and wrongful acts charged. They are, in our judgment, wholly insufficient to render him liable for the acts of his assistants and subordinates, whatever those acts may have been. Obviously, the Director of Insurance must, in a large measure, perform his official duties through assistants and subordinates appointed by authority of law. If Palmer was guilty of any act which subjects him to criticism, his offense was negligence in

the selection of such assistants and subordinates and in following their suggestions in the discharge of his official duties. But negligence, or even gullibility, in the selection of those whom he will permit to act for him in performing the duties imposed upon him by law, is insufficient to connect a public official with an unlawful conspiracy either conceived or participated in by those whom he had so selected. Nor is the fact that he clothed them with the indicia of his office, in the absence of evidence of bad faith, sufficient to render him liable for their unfaithful or unlawful acts.

Upon the record in this case, the acts and conduct of Palmer's assistants and subordinates cannot be too strongly condemned. That an official of an insurance company, even though he had violated the law, under the circumstances disclosed by the evidence in this case, should be subjected to the treatment which plaintiff received at the hands of those entrusted with the administration of a department of the State government, is intolerable. But the difficulty with plaintiff's case against Palmer is that he is compelled to rely upon the acts of others in order to establish it. Before the acts of such other parties may be charged to Palmer, there must be proof that a conspiracy existed to which he was a party. Such proof is wholly lacking. There being no such proof in the record, plaintiff must rely solely upon the acts of Palmer, which are insufficient to establish a liability against him. The rule is well settled that public officials are exempt from liability to answer for the unlawful acts of their subordinates. (*Baker* v. *Chicago, Peoria and St. Louis Railway Co.*, 243 Ill. 482.) There is nothing in the record to show any unlawful purpose or motive on the part of Palmer to act unlawfully or in any way to invade or violate the rights of plaintiff.

This court takes judicial notice that, under the conditions existing during the time covered by the acts complained of, the country was in the throes of a national economic cataclysm; that, under the wave of hysteria which gripped the country at that time, banks and insurance companies were being forced into involuntary liquidation without regard to their solvency or insolvency. Public officials generally were attempting, by emergency action, whereever possible, to prevent forced liquidations in an attempt to salvage such institutions as might be saved from the national disaster. In this unprecedented stress of the times it was not to be unexpected that public officials would, in some cases, misconstrue their powers and technically go beyond the law. But, as long as their motives were proper and not corrupt, even though they acted beyond the powers conferred upon them by law, they cannot be held liable for mere errors in judgment. Such temporary excursions beyond the letter of the law, alone, do not render them liable, nor establish a conspiracy to commit an unlwful act. In times of stress created by national emergencies, the conduct of public officials must be judged in the light of the conditions then existing. Their acts cannot be accurately appraised in the light of conditions existing after the emergency has passed. It is not difficult to see where a thing might have been done in a more approved manner when viewed in retrospect under the spotlight of subsequent developments. In our opinion the evidence in the record, giving to it all its reasonable intendments and implieations most favorable to the plaintiff, falls far short of connecting Palmer with any conspiracy or any act or intention to deprive the plaintiff of his property or property rights by coercion, fraud or duress, or by any other unlawful means, or to injure him in any way. The Appellate Court erred in so holding.

This brings us to a consideration of the case as to appellants Barr and Fitzgerald, on the merits. There are no disputed questions of fact in the record. The only question is whether, as a matter of law, the undisputed facts shown by the evidence are sufficient to sustain the plaintiff's cause of action against them.

We have heretofore set out the facts fully and at great length. Without repeating them here, we are satisfied that the Appellate Court correctly applied the law to the uncontradicted facts shown by the record. The charge is that appellants Barr and Fitzgerald obtained the property of the plaintiff by threats, coercion and duress. It is established by the evidence beyond question that, as a result of the transactions complained of, plaintiff was divested of all of his interest in the stock of the Casualty Company and of the holding companies. True, he assigned such stock to Palmer as Director of Insurance. These assignments were made and delivered, however, upon the demand of McCullough. Such demand was accompanied by threats, as already indicated, in addition to the threats made by Barr and Fitzgerald and by others connected with the Department, on prior occasions. To constitute duress, it is sufficient if the will be constrained by the unlawful presentation of a choice between comparative evils; a choice of the loss of property altogether or compliance with an unconscionable demand. In *Carpenters' Union* v. *Citizens Committee,* 333 Ill. 225, we said that coercion is as easily accomplished without threats of violence as with them, and fear of loss or injury, unless one submits to demands, is as effective as fear of violence to the person. Where duress is exerted it is immaterial that the party defrauded acquiesces in the demands or accepts an arrangement beneficial to him at the time. It is always for the interest of the party under duress to choose the lesser of the two evils.

(*Union Pacific Railroad Co.* v. *Public Service Corp.*, 248 U. S. 67, 63 L. ed. 131.) In *Chicago and Eastern Illinois Railway Co.* v. *Miller*, 309 Ill. 257, it was said that conduct under duress always involves a choice, but that this court had held that the making of a choice under such circumstances does not estop the person acting under duress from later asserting his rights.

The duress shown here consisted of repeated threats of criminal prosecution for making a false annual report of the Casualty Company, threats of prosecution for using the mails to defraud, the threat of liquidation of the company if the demands upon the plaintiff were not complied with, and intimidation by false accusations that plaintiff had embezzled money belonging to the Casualty Company and veiled threats in connection therewith. In this situation, the guilt or innocence of the plaintiff was wholly immaterial. If he was not guilty, the threats were clearly unlawful. If he was guilty, neither Barr nor Fitzgerald had suffered any pecuniary loss, nor acquired any right in plaintiffs stock by reason of such charges, nor was it their duty to prosecute him. Threats of a prosecution for an offense of which the party is actually guilty, if they induce him to part with property that he would not have voluntarily parted with, constitute duress for which a recovery may be had. The record shows that the purpose of Barr and Fitzgerald was not to right any supposed wrong done by the plaintiff, but to terrorize him and his attorney into submission to their demands. In this they were successful.

In *Elsasser* v. *Miller*, 383 Ill. 243, we said: "if, however, a person has been induced to part with a thing of value for little or no consideration, equity will seize upon the slightest circumstance of oppression, fraud, or duress for the purpose of administering justice in the case at

hand." The plaintiff having been divested of all of his stock as a result of this illegal and concerted action, each party to the conspiracy is liable for all his damages, even though some of them may not have profited by the illegal acts.

That there was concerted action by Barr and Fitzgerald and some of the employees of the Department of Insurance for the unlawful purpose of obtaining, for Barr and Fitzgerald, plaintiff's property, is established beyond the shadow of doubt. They used the Department of Insurance without Palmer's knowledge or consent, but with the active cooperation and assistance of his assistants and subordinates in the furtherance of their unlawful design and purpose. The record shows that those connected with the Department who were co-operating with Barr and Fitzgerald were willing tools in their hands. Coercion and duress are shown by the repeated charges made and the threats against the plaintiff if their demands were not met. Even if plaintiff was guilty of the charges made against him and was subject to prosecution, they had no right to demand that he surrender his property.

The record shows that both Barr and Fitzgerald profited by their unlawful conduct. The evidence also shows that the Casualty Company received certain assets and property of the plaintiff through the manipulations of Barr and Fitzgerald, which it should have discovered and accounted for as prayed for in the complaint. As to appellants Barr and Fitzgerald, we have no doubt the Appellate Court reached a correct conclusion and we find no reason to disturb such finding.

Appellants have raised a procedural question which must be disposed of in the consideration of the case as to Barr and Fitzgerald. Appellants, who were defendants

in the superior court, at the conclusion of the evidence offered by the plaintiff, made a motion for a decree in their favor, dismissing the complaint for want of equity. This motion was allowed and such decree was entered. The Appellate Court affirmed the decree as to Fidelity and Deposit Company, the surety on Palmer's bond. No appeal was taken from the judgment of the Appellate Court affirming the decree in that respect. As to all other defendants, the Appellate Court reversed the decree and remanded the cause with directions to enter a decree in accordance with the views expressed in its opinion. The effect of this was to direct the trial court to enter a decree in favor of the plaintiff on the evidence already taken, without giving to the defendants an opportunity to offer evidence in support of their defense.

Whether this remanding order was correct depends upon the proper construction of paragraph (4) of section 64 of the Civil Practice Act. (Ill. Rev. Stat. 1945, chap. 110, par. 188.) Prior to the 1941 amendment to the Civil Practice Act, the rule in equity cases was that a defendant moving for a decree in his favor at the close of the plaintiff's evidence, submitted the cause to the chancellor for final decision upon the merits upon the evidence adduced by the plaintiff. He thereby waived the right to offer evidence in support of his defense in case the motion was denied. (*Fewkes* v. *Borah*, 376 Ill. 596; *Magnolia Petroleum Co.* v. *West*, 374 Ill. 516.) The rule announced in those cases was based upon a long line of the prior decisions of this court.

In 1941, the legislature amended section 64, of the Civil Practice Act by adding thereto paragraph (4), which reads as follows: "(4) Upon the trial of a proceeding in equity defendant may, at the close of plaintiff's case, move for a finding in his favor or move to dismiss the

suit for want of equity. Either motion shall constitute a submission of the cause for decision on the merits. If the decision on the motion is adverse to the defendant he may proceed to adduce evidence in support of his defense, in which event the motion to dismiss or for a finding shall be deemed to have been waived and withdrawn."

As so amended, section 64 was construed by this court in *Kanauske* v. *Clark,* 388 Ill. 357. That was a case in equity. A motion was made at the close of the evidence offered by the plaintiff for a decree dismissing the complaint for want of equity. The motion was allowed and the complaint was dismissed. In construing paragraph (4) of section 64 of the Civil Practice Act, added by the amendment of 1941, we there said: "The rule applicable before the statute was passed was that the making of the motion amounted to a submission of the cause on the evidence taken. (*Thorworth* v. *Scheets,* 269 Ill. 573; *Koebel* v. *Doyle,* 256 Ill. 610.) The statute provides that if the decision on the motion is adverse to the defendant, he may proceed to adduce evidence in support of his defense, in which event the motion to dismiss or for a finding shall be deemed to have been waived and withdrawn. It will be noted that the statute does not change the rule, unless the decision on defendant's motion is adverse to the defendant. If the decree in this case be considered as disposing of the motion, then it must be conceded it was favorable to the defendant. Under such circumstances, the statute has no application and it is not necessary to consider its legal effect if the decision had been adverse to defendant."

The holding that the 1941 amendment to section 64 did not apply to that case was undoubtedly correct. In that case the finding of the trial court that there was no evi-

dence tending to support the plaintiff's claim was affirmed by this court. The decree was reversed and the cause remanded with directions to make certain adjustments in the decree in order to prevent a double recovery by one of the parties.

The only change made in the long-established rule, by the addition of paragraph (4) to section 64 of the Civil Practice Act, by the 1941 amendment, was to give to the defendant whose motion, at the close of the plaintiff's case, for a decree in his favor is denied by the trial court the right to offer his evidence. Prior to the amendment, he had no such right. *Thorworth* v. *Scheets*, 269 Ill. 573; *Koebel* v. *Doyle*, 256 Ill. 610.

The question presented here is, Did the 1941 amendment change the rule that a motion of the defendant, at the close of a plaintiff's evidence for a decree in his favor, constitute a submission of the cause on the merits? The amendment first reaffirms the existing rule. It definitely provides that such a motion "shall constitute a submission of the cause for decision on the merits." If the amendment stopped there, its meaning would be perfectly clear, but it would not, in any way, have changed the existing rule, announced in the above cases, which had prevailed for many years. The amendment then proceeds to say that "If the decision on the motion is adverse to the defendant, he may proceed to adduce evidence in support of his defense, in which event the motion to dismiss, or for a finding, shall be deemed to have been waived and withdrawn." The change made in the rule is clearly applicable only to cases where the ruling on the motion is adverse to the defendant. If the ruling on the motion is favorable to the defendant, of course there is no necessity for him to offer evidence, because a decree favorable to him has been granted without requiring

him to produce any evidence. That is exactly what happened in this case. But, upon review, the Appellate Court has said that the action of the chancellor was erroneous and that the ruling on the motion should have been adverse to the defendant. Do the defendants now have the right to have the case remanded for the purpose of offering their evidence in defense? Discussing this practice, this court in *Koebel* v. *Doyle*, 256 Ill. 610, speaking through Mr. Justice Cartwright, said that to remand a cause for hearing defendant's evidence in a case where the defendant's motion was allowed by the trial court and the ruling was reversed on appeal, would "result in hearing a case by piecemeal, the sustaining of a motion resulting in an appeal and on a reversal another hearing on more evidence, followed, perhaps, by another appeal. The party has a right to submit his cause to the chancellor upon the evidence adduced if he sees fit, and the motion, if made was neither more nor less than a submission of the cause to the chancellor."

The language of the amendment gives the defendant the right to offer evidence after a ruling on his motion for a decree, only in case the ruling is adverse to him. The amendment relates only to practice in the trial court. There is no language in the amendment which indicates an intention of the legislature to make any change in the existing rule, except in cases where the motion is denied. If it had intended that the change made by the amendment should apply to cases in which the motion was allowed by the trial court and the decree entered was thereafter reversed on appeal and a decree adverse to the defendant directed to be entered by the court of review, it could have undoubtedly found language in which to express such intention. Such intention cannot be implied, however, from the language used. The intention cleary

expressed in the amendment is to change the existing rule only in cases where the ruling of the trial court on the motion is adverse to the defendant. At the time the ruling is made on a motion at the close of the plaintiff's evidence, in practice, the defendant has his witnesses and other evidence in court and is in a position to proceed with the trial. If his motion is denied he may, under the 1941 amendment, then offer his evidence. If his motion is allowed, both before the amendment and under its terms, as well, he has submitted the cause to the chancellor on the evidence offered by the plaintiff for decision on the merits.

In reaching this conclusion, we have not overlooked the construction placed on a somewhat similar rule contained in the Federal Rules of Civil Procedure by the Circuit Court of appeals of the Third Circuit, in *Federal Deposit Ins. Co.* v. *Mason,* 115 Fed. 2d 549. Upon the question of the construction of our own statute that decision cannot be regarded as controlling. Moreover, the practice under the rule there construed is, in many respects, quite different from the practice in this State, both before and since the Civil Practice Act was adopted. We adhere to the construction of the 1941 amendment adopted in the *Kanauske* case.

Appellants claim that the judgment of the Appellate Court, remanding the cause with directions to enter a decree in favor of the plaintiff, deprives them of the constitutional right to have their evidence heard and considered in defense of the action. The case of *Street* v. *Chicago Wharfing and Storage Co.,* 157 Ill. 605, was a case in which the facts were parallel with the facts here involved. There, on motion of the defendants at the close of plaintiff's evidence, the court entered a decree dismissing the bill for want of equity. The Appellate Court reversed

that decree and remanded the cause with directions to enter a decree in favor of the plaintiff. The decree directed, among other things, the payment of money and was, to that extent, a money decree. The contention was there made, as here, that the action of the Appellate Court deprived the defendants of the right to introduce their evidence in defense of the action. In disposing of that contention it was there said: "It is urged it was error in the Appellate Court to remand the cause with directions to enter a decree against appellants, without giving them opportunity to introduce testimony and be heard in the circuit court. This claim is based on the fact that they brought forward no evidence, either before the master or at the hearing, but contented themselves with cross-examining the witnesses of appellee and objecting to its testimony. They had opportunity to produce such witnesses and such competent testimony as they desired. Not having availed themselves of this opportunity, it must be presumed that they either acquiesced in the statements made by the witnesses introduced by appellee as true, or concluded that they could not successfully and truthfully contradict them, and therefore were willing to submit the cause for decision, relying upon the claim of the incompetency and insufficiency of the evidence of appellee to establish its cause. As they made their bed they must lie in it. Courts will not hear causes by piecemeal. Appellants have had their day in court. If the defense they made was unsuccessful, it was their misfortune; but the fact they made a bad and insufficient defense does not give them the right to have the cause remanded for the purpose of affording them an opportunity to hunt up a better defense. Sound public policy demands that there shall be an end to litgation."

The 1941 amendment cannot be construed as changing this rule. That amendment, as pointed out in the *Kan-*

auske case, applies only to cases where the ruling on the motion for a decree dismissing a complaint is adverse to the defendant. Notwithstanding the liberal provisions of section 92 of the Civil Practice Act, (Ill. Rev. Stat. 1945, chap. 110, par. 216,) there is nothing in that section which changes the rule established by section 64(4) that a motion by the defendant for a decree in his favor at the close of the plaintiff's case shall constitute a submission of the cause for decision on the merits. The 1941 amendment only relaxed that rule in cases where the motion is denied. If there were any conflict in the two sections, the 1941 amendment, being the latest enactment, would prevail. The contentions of appellants in this respect cannot be sustained.

The affirmance of the judgment of the Appellate Court as to appellants Barr and Fitzgerald necessarily results in its affirmance as to the Casualty Company.

As to appellant Palmer, the judgment of the Appellate Court is reversed and the decree of the superior court of Cook county is affirmed.

As to appellants Barr and Fitzgerald and Illinois National Casualty Company, the judgment of the Appellate Court is affirmed.

Appellate Court reversed and superior court affirmed as to Palmer.

Appellate Court affirmed as to other appellants.

Mr. Chief Justice Gunn took no part in the consideration or decision of this case.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 288

T. H. REITER,

Petitioner,

vs.

ERNEST PALMER (IMPLEADED WITH ILLINOIS NATIONAL CASUALTY COMPANY, AN ILLINOIS CORPORATION, CLAUDE H. BARR AND ARTHUR M. FITZGERALD),

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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To the Honorable the Chief Justice of the Supreme Court of the United States and the Associate Justices:

In opposition to the petition for writ of certiorari herein, respondent, Ernest Palmer, presents the following:

1. The Petition Does Not Specify the Stage of the Proceedings Nor the Manner in Which Any Alleged Federal Question Sought to Be Reviewed Was Raised.

The petition therefore does not comply with the requirements of Rule 12, paragraph 1, nor Rule 38, paragraph 2.

Rule 12, paragraph 1, requires that when review of a State Court judgment is sought by petition for writ of certiorari, the provisions of the second paragraph of para-

graph 1 must be complied with. Rule 38, paragraph 2, states that a failure to comply with the requirements of Rule 12, paragraph 1 will be sufficient reason for denying the petition.

These rules require a summary and short statement of the matter involved. The twenty page statement at the outset of the petition fails to summarize, abridge, or clearly state those matters which petitioner considers to be involved in this proceeding.

But, aside from this failure of compliance, petitioner has wholly failed to regard the provisions of the second paragraph of Rule 12, paragraph 1, that he shall specify the stage in the proceedings in the court of first instance and in the appellate court at which, and the manner in which, the alleged Federal questions sought to be reviewed were raised. This is a "must" requirement.

Upon page 6 of the petition it is stated that certain actions of the respondent there complained of were "All without any or due process of law as provided for in Article V of the Amendments to the Constitution of the United States, and Section 2 of Article II and Section 19 of Article II of the Constitution of Illinois."

On page 3 a reference is made to Article IV, Section 13, of the Constitution of Illinois, without stating that it is involved, or how it is involved.

But at what stage in the proceedings and the manner in which these questions are claimed to have been raised is not stated.

The record shows that they were not raised in the trial court (the Superior Court of Cook County, Illinois) and that the only mention in that court of the State Constitution, or of any Constitution, is at R. 568, where it appears that after a hearing before a Master in Chancery of the

Superior Court of Cook County, petitioner stated, among many objections (number 42) to the Master's Report, that the Master erred in "overlooking the maxim that no one should depart from a court of chancery without a remedy, and also overlooked Article II, Section 19, of the Constitution of the State of Illinois." This Section 19 of Article II is that paragraph of the Bill of Rights which provides that every person ought to have a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation, and ought to obtain by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay.

While this Section, as above stated, is mentioned on page 6 of the petition, nothing is said by petitioner as to when or how any question under it was raised.

It appears that the objections, including this number 42, to the Master's Report were overruled, but it does not appear that any specific exceptions were taken before the Master or in the trial court to such overruling (R. 575). The record shows (R. 577) that the decree of the Superior Court "ratified, confirmed, sustained and approved" the Master's Report and that the exceptions of the plaintiff thereto were each and all overruled and disallowed. These exceptions were by the decree stated (R. 575) to be the objections of the plaintiff to the Master's Report. Nothing else appears in the record as to any action taken by petitioner or requested by petitioner with respect to the general reference just quoted to the Bill of Rights.

Hence the petition fails of compliance with Rule 12.

2. If There Was Any Federal Question Properly Raised in the Court of First Instance, It Was Waived by Petitioner.

Under the heading "The Questions Presented" (Pet'n, p. 22), petitioner's points with a single exception (Point XII) allege a violation of petitioner's Constitutional rights.

Article VIII, Section 75, paragraph 1, of the Civil Practice Act of Illinois provides that appeals shall be taken directly to the Supreme Court (of Illinois) in all cases in which the validity of a statute or a construction of the Constitution is involved.

The record shows (R. 22, opinion of the Appellate Court of Illinois, and R. 578) that plaintiff took his appeal instead to the Appellate Court of Illinois.

The Illinois decisions hold, *first*, (see *Economy Dairy Co.* v. *Kerner*, 371 Ill. 261, 262):

> "Before this court will take jurisdiction of an appeal on the ground that a constitutional question is involved, it must appear from the record that a fairly debatable constitutional question was alleged in the trial court, the ruling on it must be preserved in the record for review, and error must be assigned upon it here. (Citing cases.) The mere assertion that a constitutional question is involved or a constitutional right has been invaded, is not sufficient, in the absence of other grounds, to confer jurisdiction."

and, *second*, that if it is desired on appeal to raise a constitutional question, the appeal must be taken directly to the Supreme Court, and if the appeal is instead taken to the Appellate Court, such appeal constitutes a waiver of the constitutional question.

Brandtjen v. *Forgue*, 299 Ill. App. 585. The court said (p. 589):

> "Any constitutional questions have been waived

by appealing to this court. Such questions can be raised only by direct appeal to the Supreme Court."

See *People* v. *Billow*, 377 Ill. 236, 239; and see also *Simon* v. *Reilly*, 321 Ill. 431, 434.

And this court, in *Central Union Company* v. *Edwardsville*, 269 U. S. 190 held it had no jurisdiction to review a judgment of the Supreme Court of Illinois refusing to pass on a constitutional question which had been waived by taking an appeal to the Appellate Court of Illinois instead of to the Supreme Court.

3. Where a Constitutional Question Has Been Waived in the State Court, This Court Will Not Consider Nor Decide It.

See *McGoldrick* v. *Compagnie Generale*, 309 U. S. 430, 434; *Duignan* v. *United States*, 274 U. S. 195, 200; and *Central Union Company* v. *Edwardsville*, 269 U. S. 190, 195.

4. Petitioner Asks (pp. 24, 25, 26, 33) That This Court Review the Action of the Supreme Court of Illinois in Holding That There Are No Facts to Sustain a Judgment Against Respondent Palmer. The Court Will Not Do This.

This Court will not consider nor decide questions of fact where they are not necessarily involved in the decision of a constitutional question properly raised. There is no such question here before the court.

See *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 97; *Grayson* v. *Harris*, 267 U. S. 352, 357.

It is respectfully submitted that the petition for certiorari should be denied.

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